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THE

Law and Practice

RELATING TO

PROBATE AND ADMINISTRATION.



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Law and Practice

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PROBATE & ADMINISTRATION.

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW,

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AND

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OF THE PROBATE REGISTRY, SOMERSET HOUSE.

*(Being a Third edition of "BROWNE ON PROBATE," enlarged, rearranged,
and in great part rewritten.)*

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TO
THE RIGHT HONORABLE
SIR FRANCIS JEUNE,
PRESIDENT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION,

This Work

IS

(BY PERMISSION)

RESPECTFULLY DEDICATED

BY

The AUTHORS.

PREFACE.

To call the present treatise merely a Third Edition of “Browne on Probate” would be altogether unfair. Neither would it be fair to claim for it the credit of being an entirely original work, for it partakes of the character of both.

Indeed, the last edition of “Browne on Probate,” although certainly a second edition, was also something more. The coming into force of the Judicature Acts of 1873 and 1875 completely altered the whole practice of the Court of Probate in contentious matters, and Mr. Browne’s untimely death prevented his re-writing his valuable treatise so as to meet the altered state of things.

So far, then, as it dealt with the contentious business of the Court, and as regards that portion of it entitled “Practical Directions to Solicitors how to proceed in the Registry,” the last edition

of "Browne on Probate" was the original work of the present Authors.

In the present treatise all that appeared to the Authors to be of value in the last edition of "Browne on Probate" has been retained, but at the same time enlarged and re-written. The book has also been entirely re-arranged and divided into chapters, and the Authors have added a considerable amount of original matter. Mr. Oakley's "Practical Directions" appear again in an improved form, and, by the kindness of the publishers, the Authors have been favoured with the advanced proofs of the new edition of "Williams on Executors," so that the text of the present treatise is enriched with copious extracts from and references to that invaluable work.

In dealing with the contentious business of the Court, the Authors have endeavoured—at the risk of being accused of crowding their text with useless matter—to insert every rule and order of the High Court that may under any circumstances, however improbable, have either now or at any future time any application to a Probate action.

In conclusion, the Authors beg to acknowledge the assistance they have received, in and about the preparation of this book, from W. ERNST, Esq., of the Inner Temple, Barrister-at-Law, late a District Judge in the Island of Jamaica.

L. D. POWLES.

T. W. H. OAKLEY.

2, TANFIELD COURT, TEMPLE,
June 1st, 1892.

CONTENTS.



	PAGE
PREFACE	vii—ix
TABLE OF CASES	xvii—xxxix

CHAP. I.

OF THE CONSTITUTION OF THE COURT	1—9
--	-----

CHAP. II.

OF THE NATURE AND FORM OF A WILL	10—17
--	-------

CHAP. III.

OF THE KNOWLEDGE AND APPROVAL BY THE TESTATOR OF THE CONTENTS OF A TESTAMENTARY INSTRUMENT, . . .	18—21
--	-------

CHAP. IV.

WHO MAY MAKE A WILL—ALIENS—THE SOVEREIGN— PERSONS INCOMPETENT FROM WANT OF SUFFICIENT LEGAL DISCRETION	22—34
--	-------

CHAP. V.

WHO MAY MAKE A WILL—PERSONS INCAPABLE FROM WANT OF LIBERTY OR FREE WILL—PRISONERS—WILL OB- TAINED BY FORCE—FRAUD—IMPORTUNITY—UNDUE INFLUENCE	35—46
---	-------

CHAP. VI.

PAGE

WHO MAY MAKE A WILL—PERSONS INCAPABLE BY OPERATION OF LAW—MARRIED WOMEN—TRAITORS AND FELONS—OUTLAWS—PERSONS EXCOMMUNICATE—PERSONS GUILTY OF CRIMES SHORT OF FELONY.....	47—58
---	-------

CHAP. VII.

OF HOW A WILL MAY BE EXECUTED	59—82
-------------------------------------	-------

CHAP. VIII.

HOW A WILL MAY BE REVOKED, AND HOW IT MAY BE REVIVED AFTER REVOCATION	83—101
---	--------

CHAP. IX.

OF THE GRANTS ISSUED BY THE PROBATE DIVISION FOR THE PURPOSE OF ENABLING EXECUTORS AND ADMINISTRATORS TO DEAL WITH THE PERSONAL ESTATE OF DECEASED PERSONS.....	102—105
---	---------

CHAP. X.

OF THE APPOINTMENT OF EXECUTORS	106—123
---------------------------------------	---------

CHAP. XI.

OF WHAT PROBATE GRANTED—WILLS AFFECTING REALTY AND PERSONALTY—APPOINTING EXECUTOR ONLY—HEIRLOOMS—CODICILS—SEVERAL INSTRUMENTS ..	124—136
--	---------

CHAP. XII.

OF WHAT PROBATE GRANTED—INCORPORATION OF DOCUMENTS—OMISSION OF WORDS FROM PROBATE—LOST WILLS	137—156
--	---------

CHAP. XIII.

OF WHAT PROBATE GRANTED—INTERLINEATIONS, ALTERATIONS, ERASURES, AND OBLITERATIONS	157—168
---	---------

CHAP. XIV.

OF ADMINISTRATION WITH THE WILL ANNEXED	169—182
---	---------

CHAP. XV.

PAGE

AS TO HOW GRANTS OF PROBATE AND ADMINISTRATION ARE AFFECTED BY THE DOMICIL OF THE DECEASED TES- TATOR OR INTESTATE, AND BY THE SITUS OF HIS PROPERTY, AND THEREWITH OF WILLS MADE UNDER THE PROVISIONS OF THE STATUTE 24 & 25 VICT. C. 114	183—198
---	---------

CHAP. XVI.

OF SIMPLE ADMINISTRATION—TO WHOM GENERAL LETTERS OF ADMINISTRATION SHOULD BE GRANTED	199—233
---	---------

CHAP. XVII.

OF ADMINISTRATION DE BONIS NON	234—241
--------------------------------------	---------

CHAP. XVIII.

OF LIMITED GRANTS	242—264
-------------------------	---------

CHAP. XIX.

PRACTICE AS TO PROBATE IN COMMON FORM AND ADMINIS- TRATION WITH THE WILL ANNEXED	265—295
---	---------

CHAP. XX.

SIMPLE ADMINISTRATION, HOW OBTAINED	296—331
---	---------

CHAP. XXI.

SUMMONSES AND MOTIONS	332—349
-----------------------------	---------

CHAP. XXII.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION IN CONTENTIOUS BUSINESS—PARTIES	350—373
---	---------

CHAP. XXIII.

<i>Ibid.</i> —CAVEATS	374—380
-----------------------------	---------

CHAP. XXIV.

PAGE

<i>Ibid.</i> —WRIT OF SUMMONS — APPEARANCE — PLEADING GENERALLY — DELIVERY OF PLEADINGS — STRIKING OUT IRRELEVANT MATTER—STATEMENT OF CLAIM— DEFENCE — TIME FOR DELIVERY OF -- REPLY AND SUBSEQUENT PLEADINGS—PROCEEDINGS IN LIEU OF DE- MURRER—AMENDMENT OF PLEADINGS—CITATIONS. . .	381—418
--	---------

CHAP. XXV.

<i>Ibid.</i> —AFFIDAVIT OF SCRIPTS—DISCOVERY AND INSPEC- TION—ADMINISTRATORS AND RECEIVERS PENDENTE LITE	419—438
--	---------

CHAP. XXVI.

<i>Ibid.</i> —TRIAL—TRIAL AT ASSIZES—PROCEEDINGS AT TRIAL —APPLICATION FOR NEW TRIAL—MOTION FOR JUDG- MENT—RIGHT TO BEGIN—COMPROMISE	439—459
--	---------

CHAP. XXVII.

<i>Ibid.</i> —EVIDENCE	460—478
----------------------------------	---------

CHAP. XXVIII.

<i>Ibid.</i> —APPEALS—TO COURT OF APPEAL AND HOUSE OF LORDS FROM PROBATE DIVISION—TO PROBATE DIVISION FROM COUNTY COURTS.	479—489
---	---------

CHAP. XXIX.

<i>Ibid.</i> —ENFORCING ORDERS—ATTACHMENT—INJUNCTIONS, MANDAMUS, &c.—SITTINGS AND VACATIONS—TIME TABLE—NOTICES—OFFICE COPIES—MINUTES, &c.— SERVICE OF ORDERS, &c.—MISCELLANEOUS POINTS OF PRACTICE.	490—514
---	---------

CHAP. XXX.

<i>Ibid.</i> —COSTS IN PROBATE ACTIONS	515—551
--	---------

APPENDIX.

	PAGE
STATUTES	553—675
RULES FOR THE PRINCIPAL REGISTRY	676—692
FORMS USED IN THE PRINCIPAL REGISTRY	693—705
ALTERATION OF FEES	706
RULES FOR THE DISTRICT REGISTRIES	707—722
RULES AND ORDERS IN RESPECT OF CONTENTIOUS BUSI- NESS	723—743
FEES IN NON-CONTENTIOUS BUSINESS	744—757
COSTS IN NON-CONTENTIOUS BUSINESS	758—766
FEES IN CONTENTIOUS BUSINESS	767—770
COSTS IN CONTENTIOUS BUSINESS	771—775
EXAMPLES OF FORMS OF PLEADING IN SPECIAL CASES ..	776—780
FORMS UNDER THE JUDICATURE ACTS	781—828
COSTS	829—837

INDEX	839
-------------	-----

TABLE OF CASES.

A.	PAGE	PAGE	
ABBOTT <i>v.</i> Abbott	264	Askew <i>v.</i> Rooth	54
Abraham <i>v.</i> Joseph	93	Astell, In goods of	230
Ackerley <i>v.</i> Parkinson	412	Aston, In goods of	173
Acton <i>v.</i> White	51	Astor, In goods of	118, 132
Adams, In goods of	165	Atkinson, In goods of	130
Adamson, In goods of 110,	160	——— <i>v.</i> Barnard	182
——— <i>v.</i> Hammond	554	——— <i>v.</i> Queen's Proctor..	540
Aguilar <i>v.</i> Aguilar	51	Atter <i>v.</i> Atkinson	18, 41, 73
Ainsworth, In goods of	65	Att.-Gen. <i>v.</i> Brackenbury....	60
Aitkin <i>v.</i> Ford	220	——— <i>v.</i> Cockerell	183
Alford <i>v.</i> Alford	254	——— <i>v.</i> Higgins	198
Allen, In goods of	225	——— <i>v.</i> Parnter	27
———, Re	67	Austen, In goods of	82
——— <i>v.</i> Humphreys....	204, 260	——— <i>v.</i> Graham	28
——— <i>v.</i> Macpherson	36	——— <i>v.</i> Hodges	205
——— <i>v.</i> Maddock	138, 139	Avard, In goods of	241
Allison, In goods of	196	Avison <i>v.</i> Simpson	176
Allnutt, In goods of	127	Ayres, In goods of	206, 316
Almes <i>v.</i> Almes.....	212, 240	Ayrey <i>v.</i> Hill	27, 33
Almosnino, In goods of	139		
Alston, In goods of	349		
Amelia Vizer	205		
Amiss, Re	69		
Anderson, In goods of 129,	207		
——— <i>v.</i> Anderson.....	100		
Andrew Agnell's case	48		
Andrew, In goods of	86, 114		
——— <i>v.</i> Brooke.....	465		
——— <i>v.</i> Motley.....	92		
Andrews <i>v.</i> Murphy	223		
Angas <i>v.</i> Henderson	222		
Applebee, In goods of	97		
Appleby, In goods of.....	243		
Arbery <i>v.</i> Ashe	28		
Archer, In goods of	64		
——— <i>v.</i> Burke	540		
——— <i>v.</i> Hudson	42		
Armour <i>v.</i> Walker	463		
Arthur, In goods of	65		
Ashley, In goods of	225, 263		
Ashwell <i>v.</i> Lomi	41		
Askew <i>v.</i> Askew	438		

	PAGE
Babin, In goods of	206
Baddeley, In goods of	325
Badenach, In goods of ..122,	123
Bagnall <i>v.</i> Downing	15
Bagshawe <i>v.</i> Canning	163
Baigent <i>v.</i> Baigent	495
Baily, In goods of 63, 86,	170
Baker <i>v.</i> Baker	495
——— <i>v.</i> Batt	19
——— <i>v.</i> Brooks.....	319
Ball <i>v.</i> Mannin	33
Ballingall, In goods of....218,	315
Banfield <i>v.</i> Pickard.....	462
Bangham, In goods of	86
Banks <i>v.</i> Goodfellow ..28, 29-31,	33
Bannatyne <i>v.</i> Bannatyne	27
Barber, In goods of	153, 344
Barden, In goods of	52, 125

B.

B.	PAGE
Babin, In goods of	206
Baddeley, In goods of	325
Badenach, In goods of	122, 123
Bagnall <i>v.</i> Downing	15
Bagshawe <i>v.</i> Canning	163
Baigent <i>v.</i> Baigent	495
Baily, In goods of	63, 86, 170
Baker <i>v.</i> Baker	495
——— <i>v.</i> Batt	19
——— <i>v.</i> Brooks.....	319
Ball <i>v.</i> Mannin	33
Ballingall, In goods of	218, 315
Banfield <i>v.</i> Pickard.....	462
Bangham, In goods of	86
Banks <i>v.</i> Goodfellow..	28, 29-31, 33
Bannatyne <i>v.</i> Bannatyne	27
Barber, In goods of	153, 344
Barden, In goods of	52, 125

b

	PAGE		PAGE
Barker, In goods of	242	Blewitt, In goods of	159
Barnes, In goods of	113	Blisset, In goods of	174
—— <i>v.</i> Durham	553	Bloomfield, In goods of	176
—— <i>v.</i> Vincent	52	Bloxam <i>v.</i> Favre	24, 193
—— <i>v.</i> Ward	225	Body, In goods of	153
Barrow <i>v.</i> Barrow	98	Boehm, In goods of	20
Barry <i>v.</i> Butlin	37, 41, 457	Bolton, In goods of	132
Barton <i>v.</i> North Staffordshire Railway	463	Bond <i>v.</i> Bond	432
—— <i>v.</i> Robins	150	—— <i>v.</i> Seawell	79
Bascomb <i>v.</i> Harrison	364	Bone <i>v.</i> Whittle	542, 546
Bateman, In goods of ..	223, 228, 230	Bonelli, In goods of	478
Batterbee, In goods of ..	180, 247, 253	Bonham, In goods of	113
Bayard, In goods of	237	Bootle, In goods of	125
Bayley <i>v.</i> Bayley	555	Borlase <i>v.</i> Borlase	27, 93
Baylis, In goods of	110, 113	Bosanquet, In goods of	73
Baynes <i>v.</i> Harrison	223	Boston <i>v.</i> Fox	365, 540
Beale <i>v.</i> Beale	541, 545	Boughton <i>v.</i> Knight ..	28, 29—31, 32, 549
Beckett <i>v.</i> Howe	67, 72, 73, 75	Bourget, In goods of	226
Beddington <i>v.</i> Beddington ..	389	Bouverie <i>v.</i> Maxwell ..	221, 317
Bedford, In goods of	96	Boxley <i>v.</i> Stubbington ..	182
Bedwell, In goods of	476	Boyd, In re	467
Beech <i>v.</i> Rathbone	446	Boyle, In goods of	123, 219
Belbin <i>v.</i> Keats	477	Boyse <i>v.</i> Rossborough ..	39, 41
Belcher <i>v.</i> Maberley	223	Brackenbury, In goods of ..	221
Bell, In goods of ..	110, 123, 205, 284	Braddock, In goods of	133
—— <i>v.</i> Armstrong	367	Bradford <i>v.</i> Young	324
—— <i>v.</i> Fothergill	92, 98	Bradley, In goods of	111, 437
Bellamy, In goods of	161	Bradshaw, In goods of	324
Bellew <i>v.</i> Bellew	436	Braham <i>v.</i> Burchell	51, 367
Bennett, In goods of	171, 347	Braine <i>v.</i> Braine	554
Berdan <i>v.</i> Greenwood	463	Brake, In goods of	115
Bernard, In goods of	476	Bramley <i>v.</i> Bramley	538
Berthon <i>v.</i> Berthon	90	Brand, In goods of	34
Betts, In goods of	117	—— <i>v.</i> Mitson	416
—— <i>v.</i> Doughty	373, 411	Bransby <i>v.</i> Haines	48
Bevan, In goods of	214	Bremer <i>v.</i> Freeman	543, 547
Beverley's case	28	Brenchley <i>v.</i> Lynn	209
Bewsher <i>v.</i> Williams	544, 547	—— <i>v.</i> Still	15, 91
Bianchi, In goods of	218	Brewis, In goods of	138
Bidder <i>v.</i> Bridges	463	Brewster, In goods of	91
Bigg <i>v.</i> Keen	182	Bridges <i>v.</i> Strachan	86
Biggs, In goods of	174	Brighton, In goods of	203
Bilke <i>v.</i> Roper	53	Broadbent <i>v.</i> Hughes ..	543, 547
Billingham <i>v.</i> Vickers ..	19, 33	Brogden <i>v.</i> Brown	27
Binckes, In goods of	254	Brook <i>v.</i> Brook	84
Bird <i>v.</i> Bird	33, 39	—— <i>v.</i> Turner	49
Birks <i>v.</i> Birks	132	Brooke <i>v.</i> Kent	96
Bishop, In goods of	73, 345	Brotherton <i>v.</i> Hellier	365
—— <i>v.</i> Wall	54	Brown, In goods of ..	111, 116, 154, 180
Black, In goods of	252	—— <i>v.</i> Atkins	221
—— <i>v.</i> Jobling	98, 129	—— <i>v.</i> Brown ..	99, 153, 465
Blackwell, In goods of	113	—— <i>v.</i> Fisher	37
Blagrove, In goods of	225	—— <i>v.</i> Nicholls	175
Blake, In goods of	212	—— <i>v.</i> Wildman	220, 416
—— <i>v.</i> Midland Rail. Co. ..	225	Browning, In goods of ..	206, 226
Bleckley, In goods of	93	—— <i>v.</i> Budd	19, 39

	PAGE
Browning <i>v.</i> Reane	203
Brownrigg <i>v.</i> Pike	52, 126
Brunt <i>v.</i> Brunt	93
Bryce, In goods of	62
Bubbers <i>v.</i> Harfey	201
Budd <i>v.</i> Silver	240
Bull <i>v.</i> Bull	446
Bullar, In goods of	178, 219
Bullpin <i>v.</i> Clarke	51
Burch, In goods of	219
Burchmore, In goods of	246
Burdett, In goods of	223
—— <i>v.</i> Thompson	32
Burdon <i>v.</i> Morgan	259
Burgess, In goods of	229, 245
Burgoine <i>v.</i> Moordaff	442
Burgoyne <i>v.</i> Showler	76
Burls <i>v.</i> Burls	99, 154, 535
Burrell, In goods of	230, 313
Burroughs <i>v.</i> Griffiths	220, 366
Burt, In goods of	162
Burtenshaw <i>v.</i> Gilbert	97, 98
Burton <i>v.</i> Collingwood	16
—— <i>v.</i> Newbury	86, 100
Bushell, In goods of	20
—— <i>v.</i> Blenkhorn	446
Bute, Marquis of, <i>v.</i> James ..	463
Butlin <i>v.</i> Barry	19
Butterfield <i>v.</i> Scawen	36
Byrd, Re	67
Byrne, In goods of	222

C.

Cadge, In goods of ..	160, 163, 177
Calamy <i>v.</i> Hyde	97
Calloway, In goods of	118, 132
Campbell, In goods of	257
—— <i>v.</i> Lucy	125, 417
Canning, In goods of	215, 300
Cape Copper Co. <i>v.</i> Comptoir D'Escompte	462
Cardell <i>v.</i> Harvey	209
Carless <i>v.</i> Thompson	537
Carlton <i>v.</i> Carlton	193
Carmichael, In goods of	172
Carpenter <i>v.</i> Queen's Proctor	437
—— <i>v.</i> Shelford	224
Carr, In goods of	240
Cartwright's case	211
Cartwright <i>v.</i> Cartwright	27
Casement <i>v.</i> Fulton	70
Casmore, In goods of	65
Cassidy, In goods of	251
Casson <i>v.</i> Dade	76

	PAGE
Cater <i>v.</i> Price	76
Cathrell <i>v.</i> Jeffree	360
Catrall, In goods of	64, 79
Cawthron, In goods of	16
Chamberlain, In goods of	365, 371, 414
Chambers <i>v.</i> Bicknell	251
—— <i>v.</i> Queen's Proctor ..	27
Chamney, In goods of	67
Chapman, In goods of	100
Chappell, In goods of	110
—— <i>v.</i> Charlton	49
Charlton <i>v.</i> Hindmarsh ..	67, 68, 434
Charter <i>v.</i> Charter	114
Chaworth <i>v.</i> Beech	15
Cheese <i>v.</i> Lovejoy	91, 93
Chittenden <i>v.</i> Knight	209
Cholwill, In goods of	229
Christian, Re	68
Christmas <i>v.</i> Whinyates	93, 98
Clare <i>v.</i> Hedges	248
Claridge, In goods of	72
Clark, In goods of ..	19, 61, 62, 63, 344
Clarke, In goods of	63, 229
—— <i>v.</i> Lear	27
—— <i>v.</i> Scripps	93
Clarkington, In goods of ..	225, 262
Clarkson <i>v.</i> Clarkson	93, 97
Claus, In goods of	135
Clayton <i>v.</i> Browne	224, 300
——, In goods of	212, 228
—— <i>v.</i> Davies	536
Cleare <i>v.</i> Cleare 18, 41, 73, 541,	545
Cleaver <i>v.</i> McKenna	222
Clerk <i>v.</i> Ward	76
Clerke <i>v.</i> Clerke	49, 229
Cleverly <i>v.</i> Gladdish	314
Clogstown <i>v.</i> Wallcott	98
Clook, In goods of	224
Cock <i>v.</i> Allcock	463
—— <i>v.</i> Cooke	15
Cockayne, In goods of	97
Cockcraft <i>v.</i> Rawles	39, 40
Coghlan <i>v.</i> Coghlan	27
Colberg, In goods of	93
Cole, In goods of	132
Coleman, In goods of	93, 167
Coles, In goods of	15, 223
—— <i>v.</i> Coles	477
Collier, In goods of	250
Collison <i>v.</i> Mawe	218
Colquhoun, In goods of	117
Colvin <i>v.</i> Queen's Proctor	224
Colyer, In goods of	12, 15
Combe's case	33
Comer <i>v.</i> Parnell	370
Constable <i>v.</i> Tufnell	33, 39

	PAGE
Conyers <i>v.</i> Kitson	207
Coode, In goods of	86, 183
Cook <i>v.</i> Cowper	201
— <i>v.</i> Lambert	62
— <i>v.</i> Tomlinson	461
Cooke, In goods of	93, 181, 228
Cookson, H. J.	212
Coombs, In goods of	65, 221
— <i>v.</i> Coombs	221
Cooper, In goods of	49, 86, 110, 128, 180, 250
— <i>v.</i> Bockett	67, 160
— <i>v.</i> Green	416
— <i>v.</i> Macdonald	203
— <i>v.</i> Moss	446
Cope, In goods of	316, 431
Copleston <i>v.</i> Nicholes	370
Corby, In goods of	82
Cordeux <i>v.</i> Trasler	209, 461
Core <i>v.</i> Spencer	367
Corser, In goods of	206, 219, 226
Cosnahan, In goods of	179, 186
Cottrell <i>v.</i> Cottrell	90, 537
Coulthard, In goods of	127
Courier, The	530
Court, In goods of	114
Cousins <i>v.</i> Tubb	542, 544
Covell, In goods of	241, 325
Coventry <i>v.</i> Williams	15
Coward, In goods of	54
Cozens, In goods of	172
Craig <i>v.</i> Lester	45
Cranmer, Ex parte, Sherwood <i>v.</i> Sanderson	33
Crause, In goods of	205
Crawford, In goods of	190, 260
Cregreen <i>v.</i> Willoughby	77
Cringan, In goods of	117
Crispin <i>v.</i> Doglioni	185, 365, 553
Critchell <i>v.</i> Critchell	551
Croft <i>v.</i> Croft	78
Crofts, In goods of	54
Crompton <i>v.</i> Collinson	54
Crookenden <i>v.</i> Fuller	192
Crosbie <i>v.</i> McDoual	86
Crosby <i>v.</i> Noton	417
Cross <i>v.</i> Cross	18, 457, 536, 540
Crump, In goods of	254
Cubban, In goods of	53, 126
Cubbon <i>v.</i> Steele	173
Cull <i>v.</i> Guillerme	182
Culliffe <i>v.</i> Cross	18, 73
Cunningham, In goods of	165
Currey, In goods of	263
Currie <i>v.</i> Bircham	183
Cutto <i>v.</i> Gilbert	87, 103, 154

D.

	PAGE
Dabbs <i>v.</i> Chesman	219, 221
— <i>v.</i> Chisman	366
Da Cunha (Countess), In goods of	187, 200
Da Rosa <i>v.</i> De Pinna	201
Da Silva, In goods of	126
Dadds, In goods of	94
Daintree <i>v.</i> Fasulo	74
Dalbiac <i>v.</i> Dalbiac	51
Dallow, In goods of	67, 113, 146
Dalton, In goods of	246
Daniel, In goods of	142
Darke, In goods of	106, 173
Darley <i>v.</i> Martin	85
Davies <i>v.</i> Brecknell	452, 488, 492
— <i>v.</i> Davies	92
— <i>v.</i> Gregory	542, 546
— <i>v.</i> Rees	544, 548
Davis, In goods of	67, 182
— <i>v.</i> Davis	99, 154
Davy <i>v.</i> Smith	76
Dawes, In goods of	435, 438
Dawson, In goods of	182
De Bode, In goods of	91, 97
De Chatelain <i>v.</i> De Pontigny ..	434
De la Farque, In goods of	315
De la Rue, In goods of	132
De la Saussaye, In goods of ..	86
De Pradel, In goods of	54
De Rosaz, In goods of	114
De Salazar, In goods of	477
Dean <i>v.</i> Davidson	345
Deardsley <i>v.</i> Fleming	46
Deare <i>v.</i> Elwyn	40
Dempsey <i>v.</i> King	182
Dench <i>v.</i> Dench	166
Dennis, In goods of	101
Dent, In goods of	129, 152
— <i>v.</i> Bennett	41
Depit <i>v.</i> Delevieluse	221
Deshais, In goods of	191
Dew <i>v.</i> Clark	28
Dickenson <i>v.</i> Moss	39
— <i>v.</i> Swatman	97
Dickinson <i>v.</i> Stidolph	97, 138
Dilkes, In goods of	67
Dimes <i>v.</i> Cornwall	219
— <i>v.</i> Dimes	27
Ditchfield, In goods of	171
Diveny <i>v.</i> Corcoran	198
Dixon, In goods of	177
Dobson, In goods of	17
Dodgson, In goods of	243, 258
Doe <i>d.</i> Cross <i>v.</i> Cross	14
— <i>d.</i> Evans <i>v.</i> Ward	85
— <i>v.</i> Harris	92
— <i>v.</i> Hiscocks	154

	PAGE
Doe <i>d.</i> Perkes <i>v.</i> Perkes	93
— <i>d.</i> Shallcross <i>v.</i> Palmer ..	154, 160
— <i>d.</i> Spilsbury <i>v.</i> Burdett..	77
— <i>d.</i> Stutsbury <i>v.</i> Smith ..	77
— <i>d.</i> Tatum <i>v.</i> Catomore ..	160
— <i>d.</i> Tatham <i>v.</i> Wright ..	26
— <i>d.</i> Wright <i>v.</i> Manifold ..	76
Domville <i>v.</i> Domville	370
Donaldson, In goods of ..	79, 80, 86, 132
Donegal's (Lord) case	36
Donovan <i>v.</i> Donovan	339
D'Orleans (Duchess), In goods of	187, 188, 201
Dost Aly Khan, In goods of ..	259, 478
Douce, In goods of	61
Drew <i>v.</i> Long	223
Drewitt <i>v.</i> Drewitt	461
Drinkwater, In goods of	230
Drummond <i>v.</i> Parish	80
Duane, In goods of	150
Du Boison <i>v.</i> Maxwell	554
Duchess of Kingston's case ..	103
Duggins, In goods of	70
Duguid <i>v.</i> Fraser	126
Dunn <i>v.</i> Dunn	447, 489, 493
Duppa <i>v.</i> Mayo	96
Durance, In goods of	91
Durham, In goods of	223
Durnell <i>v.</i> Corfield	19, 33
Dutton, In goods of	98, 127
Dye <i>v.</i> Dye	50
Dyke, In goods of	101
— <i>v.</i> Williams	540

E.

Earl, In goods of ...	180, 184, 186
Earle, In goods of	316
Eccles, In goods of	230, 256
Eckersley <i>v.</i> Platt	97
Edmonds <i>v.</i> Lewer	62
Edwards <i>v.</i> Payne	554
Eeles, In goods of	93, 97
Elcock, In goods of	62
Elderton, In goods of	219
Ellice, In goods of	98
Elliott, In goods of	54
— <i>v.</i> Gurr	203
Elme <i>v.</i> Da Costa	219, 220
Elms <i>v.</i> Elms	93
Elmsley, In goods of	122
— <i>v.</i> Young	84

	PAGE
Emberley <i>v.</i> Trevanion ..	370, 539
Emly <i>v.</i> Davidson	14
England <i>v.</i> Wall	313
English, In goods of	14
Enohin <i>v.</i> Wylie	184, 188
Ernest <i>v.</i> Eustace	224
Escott, In goods of	218, 230
Essex <i>v.</i> Atkins	51
Eustace, In goods of	54, 89
Euston (Earl of) <i>v.</i> Seymour (Lord H.)	79
Evans, In goods of	438
— <i>v.</i> Burrell	183, 416
— <i>v.</i> Dallow	92, 98
—, Doe <i>d.</i> <i>v.</i> Ward	85
— <i>v.</i> Jones	431
— <i>v.</i> Knight	26, 27
— <i>v.</i> Tyler	254
Evelyn, Ex parte	254
Everley, In goods of ..	163, 167, 233
Ewart, In goods of	349
Ewen <i>v.</i> Franklin	67, 79
Ewing, In goods of ..	198, 244, 261
Exors. of Perry <i>v.</i> The Queen.	198
Eynon, In goods of	70

F.

Fairweather, In goods of	181, 222, 227
Faraday, In goods of	53, 203
Farlar <i>v.</i> Farlar	398, 541, 545
Farquhar, In goods of	80
Farrands, In goods of	228
Farrell <i>v.</i> Brownbill	227
Farrer <i>v.</i> St. Cath.'s Coll. Cam.	86
Faulds <i>v.</i> Jackson	73
Fawcett, In goods of	438
— <i>v.</i> Jones	19
Fawcus, In goods of	472
Fawkener <i>v.</i> Jordan	244
Fenwick, In goods of ...	54, 84, 86
Ferguson Davie <i>v.</i> Ferguson Davie	16
Fernie, In goods of	107
Ferry <i>v.</i> King	539
Fettilplace <i>v.</i> Gorges	51
Field <i>v.</i> Wratby	211
Fielder <i>v.</i> Hanger	205
Finch <i>v.</i> Finch	99, 154
Findlay, In goods of	230
Finney <i>v.</i> Mayhew	123
Fischer <i>v.</i> Popham	78, 91
Fisher <i>v.</i> Fisher	439, 538
Fittock, In goods of	183
Fitzroy, In goods of	84

H.

	PAGE
Hacker <i>v.</i> Newborn	38
Haddon <i>v.</i> Fladgate	51
Hagger, In goods of	229, 247
Hale, In goods of	181, 227
— <i>v.</i> Tokelove	100
Hall, In goods of	165
— <i>v.</i> Hall	39
— <i>v.</i> Warren	27
Halliwell, In goods of	218, 316
Hallyburton, In goods of	186
Hamer <i>v.</i> Boreham	360
Hammond, In goods of	64, 79, 241, 249
Hampden <i>v.</i> Wallis	495
Hampson, In goods of	250
Hankin <i>v.</i> Turner	555
Hankinson <i>v.</i> Barningham ..	395
Hanley, Re	347
Harding, In goods of	205
— <i>v.</i> Sutton	51, 373
Hardstone, In goods of	254, 314
Hardy, In goods of	166
Harenc <i>v.</i> Dawson	417
Hargreaves <i>v.</i> Wood	123, 458
Harrigan, In goods of	314
Harrington, In goods of	343, 402
— <i>v.</i> Bowyer	41, 541, 545
Harris, In goods of	65, 86, 92, 96, 98, 118, 132, 167
— <i>v.</i> Berrall	34, 93
— <i>v.</i> Bradbury	395
— <i>v.</i> Knight	155
— <i>v.</i> Milburn	263
Harrison, In goods of	248
— <i>v.</i> Allpers	223
— <i>v.</i> Elvin	69
— <i>v.</i> Kirby	405
Harrod <i>v.</i> Harrod	33
Harter <i>v.</i> Harter	152
Hartley, In goods of	135
Harver, In goods of	316, 437
Harvey <i>v.</i> Allen	457
Harwood <i>v.</i> Baker	33, 40
Hastilow <i>v.</i> Stobie	18, 73, 406
Hastings, In goods of	89, 142, 255
Hatton, In goods of	62
Hawarden <i>v.</i> Dunlop	198, 258
Hawke <i>v.</i> Wedderburne ..	181, 219, 220, 228
Hawkesley <i>v.</i> Barrow	54, 91
Hawkins, In goods of	537
Hay, In goods of	197, 203, 244, 248
— <i>v.</i> Willoughby	248
Hayes, In re	80
Haynes, In goods of	106
— <i>v.</i> Matthews	201, 228

	PAGE
Heath <i>v.</i> Heath	555
Heathcote, In goods of	53, 142, 147
Heatley <i>v.</i> Thomas	51
Heaton, In goods of	112
Hellier <i>v.</i> Hellier	88, 432
Henfrey <i>v.</i> Henfrey	90
Henley, In goods of	325
— <i>v.</i> Phillips	49
Herbert <i>v.</i> Herbert	51, 82
— <i>v.</i> Lowns	33
— <i>v.</i> Shiell	315
Hibben <i>v.</i> Calemhourg	366
Hickman <i>v.</i> Upsall	347
Hicks, In goods of	15, 91
Higgins, In goods of	62
Hill <i>v.</i> Wilson	154
Hillam <i>v.</i> Walker	366, 543, 553
Hills <i>v.</i> Mills	253
Hinckley, In goods of	171
Hindmarch, In goods of	161
Hindmarsh <i>v.</i> Charlton	70
Hingeston <i>v.</i> Tucker	365
Hobbs <i>v.</i> Knight	92
Hobson <i>v.</i> Blackburn	17
Hoby <i>v.</i> Hoby	28
Hockley <i>v.</i> Wyatt	541, 545
Hodsden <i>v.</i> Lloyd	49
Hoghton <i>v.</i> Hoghton	41
Holditch <i>v.</i> Carter	553
Holgate, In goods of	72, 76
Holroyd, In goods of	227
Holyland, Ex parte	28
Homan, In goods of	173
Homerton <i>v.</i> Hewitt	98
Homfray, In goods of	57, 126
Honeywood, In goods of	152
Hope <i>v.</i> Ewing	261
Hopkins, In goods of	224, 230
Hornbuckle, In goods of ..	52, 125, 126, 226, 325
Horrell <i>v.</i> Witts	435
Horsford, In goods of	62, 96, 157, 167
Hoskins, In goods of	67, 136
Houblon, In goods of	128
Houston, In goods of	315
How, In goods of	345
Howard, In goods of	86
— <i>v.</i> Damiani	51
Howden (Lord), In goods of ..	86, 141
Howell <i>v.</i> Metcalfe	258
Hubbard, In goods of	15, 91, 151
— <i>v.</i> Alexander	130
— <i>v.</i> Lees	60
Huckvale, In goods of	65, 72, 73
Huddleston, In goods of	20
Huddleston <i>v.</i> Huddleston ..	205

	PAGE
Hudson <i>v.</i> Parker	75
Hughes, In goods of	66, 231
—— <i>v.</i> Cook	314
—— <i>v.</i> Richards	243
Huguenin <i>v.</i> Baseley	39, 41
Hulme <i>v.</i> Tenant	51
Humphreys, In re	204, 260
—— <i>v.</i> Allen	204, 260
Hunt, In goods of	15, 19, 64
—— <i>v.</i> Anderson	431
—— <i>v.</i> Hunt	64
Hunter <i>v.</i> Atkins	41
Hutcheson, In goods of	196
Hutley <i>v.</i> Grimstone	457
Hux, In goods of	77
Hyde <i>v.</i> Hyde	97
—— <i>v.</i> Mason	97

I.

Ihler, In goods of	208
Ilchester (Lord), <i>Ex parte</i>	97
Ilott <i>v.</i> Genge	71, 73, 74, 75
Ince, In goods of	86, 100, 129
Inglesant <i>v.</i> Inglesant	72, 73
Ingram <i>v.</i> Strong	374
—— <i>v.</i> Wyatt	19, 36, 39, 41
Inkson <i>v.</i> Jeeves	401
Iredale <i>v.</i> Ford	209, 313
Ireland <i>v.</i> Rendall	41, 541, 545
Irving, In goods of	319
Isabella Stewart, In goods of	188
Isherwood <i>v.</i> Cheetham	405

J.

Jackson, In goods of	343
—— <i>v.</i> Jackson	315
—— <i>v.</i> Paulet	117
—— <i>v.</i> Whitehead	122
James, In goods of	96, 166
—— <i>v.</i> Shrimpton	98
Jameson, In goods of	208
Janaway, In goods of	72
Jauncey <i>v.</i> Patey	183
Jeffery <i>v.</i> Cancer Hospital (The)	161
—— <i>v.</i> Jeffery	554
Jenkins, In goods of	372
Jenkyns <i>v.</i> Gaisford	61
Jenner <i>v.</i> Finch	76, 89, 542
Jobson <i>v.</i> Ross	17
John, In goods of	209
—— <i>v.</i> Bradbury	219
Johnson, In goods of	77, 117, 212, 224

	PAGE
Johnson <i>v.</i> Lyford	90, 99, 154
—— <i>v.</i> Weldy	416
Jones, In goods of	64, 65, 73, 93, 112, 218, 229, 252, 313, 318
—— <i>v.</i> Godrich	41
—— <i>v.</i> Jones	370
—— <i>v.</i> Nicholay	14
—— <i>v.</i> Williams	366
Jordan, In goods of	125, 172
Joseph, In goods of	254
Joys, In goods of	52, 85
Jupp, In goods of	177

K.

Keane, In goods of	211, 224
Kearney <i>v.</i> Whittaker	224
Keen <i>v.</i> Keen	90, 99, 154
Keene, In goods of	242
Keller, In goods of	193
Kellick, In goods of	75, 76
Kelly <i>v.</i> Thewles	41
Kemble <i>v.</i> Church	27
Kendall <i>v.</i> Kendall	176
Kennaway <i>v.</i> Kennaway	368, 414
Kenworthy <i>v.</i> Kenworthy	416
Kilcher, In goods of	69
Kimpton, In goods of	64
Kindleside <i>v.</i> Harrison	26, 27, 33, 38
King, In goods of	163, 237, 316, 476
—— <i>v.</i> Gillard	535
Kingdon, In re	126
King's Proctor <i>v.</i> Daines	14
Kipping <i>v.</i> Ash	365
Kirke <i>v.</i> Kirke	97
Kirkebride, In goods of	344
Kirwan's Trusts, Re	193
Kiver <i>v.</i> Oldfield	85
Klingeman, In goods of	478
Knapp or Robins, In goods of	316
Knight <i>v.</i> Cooke	99, 154
Kooystra <i>v.</i> Buyskes	171

L.

Lacroix, In the goods of	192
Lainson <i>v.</i> Naylor	416
Lambell <i>v.</i> Lambell	98, 207
Lambert, In re, Stanton <i>v.</i> Lambert	203
——, In goods of	93, 476

	PAGE		PAGE
Lambeth Guardians <i>v.</i> Bradshaw	222	M.	
Lamphier <i>v.</i> Despard	176	Maas <i>v.</i> Sheffield	50
Lancaster, In goods of	144	Maclean <i>v.</i> Davison	259
—— <i>v.</i> Brooke	445	Macleur <i>v.</i> Macleure	492
Lane, In goods of	117	Macnin <i>v.</i> Coles	221
Langen <i>v.</i> Tate	463	M'Adam <i>v.</i> Walker	27
Langford, In goods of	117	McCabe, In goods of ..96, 97, 100,	157, 167
Lanueville <i>v.</i> Anderson ..176, 185		McDonald, In goods of	314
Larpent <i>v.</i> Sindry	186	McGowan, In goods of	316
Law, In goods of	128	McGregor, In goods of	149
Lawson <i>v.</i> Vacuum Brake Co. 463		McMurdo, In goods of 80, 81	
Lay, In re	81	McPherson <i>v.</i> Parnell	465
Leake <i>v.</i> Hurst	405	McVicar, In goods of	84
Lean <i>v.</i> Viner	416	Machell, In goods of	229
Le Breton <i>v.</i> Fletcher	28	Maddock, In goods of 70, 165	
Leeman <i>v.</i> George	542, 546	Mahoney <i>v.</i> McCarthy	400
Leese, In goods of	86, 114	Main, In goods of	345, 346
Leeson, In goods of	218	Malen, In goods of	67
Leggatt <i>v.</i> Leggatt	209	Maley, In goods of	94
Legge <i>v.</i> Edwards	211	Manly, In goods of	111
Leigh <i>v.</i> Green ..489, 516, 542, 546		Mann, In goods of	65, 261
Lemage <i>v.</i> Goodban ..87, 88, 90, 130		—— <i>v.</i> Perry	495
Leven, In goods of	112	Maraver, In goods of	54
Leverington, In goods of 69		Margary <i>v.</i> Robinson	66
Lewis, In goods of 69, 92, 133,	252, 255	Marsden, In goods of	15
——, Re	347	Marsh <i>v.</i> Marsh	79, 100
—— <i>v.</i> Lewis	69	—— <i>v.</i> Tyrrell	33, 39
—— <i>v.</i> Pead	33	Marshall, In goods of	62
Lighton, In goods of	117	Marshman <i>v.</i> Brookes	496
Limbery <i>v.</i> Mason	97	—— <i>v.</i> Hughes	319
Lindsay <i>v.</i> Lindsay	17, 367	Martin, In goods of 17, 54, 94	
Lister <i>v.</i> Smith	15, 370, 371	—— <i>v.</i> Johnston	26
Llanwarne, In goods of	229	—— <i>v.</i> Laking	99, 154
Lloyd, In goods of	225	Martindale, In goods of 182	
—— and Hart <i>v.</i> Roberts .. 78		Maskeline <i>v.</i> Harrison	432
—— <i>v.</i> Roberts	71	Mason, In goods of	52, 84
Locke <i>v.</i> James	97	—— <i>v.</i> Comptoir D'Es-	
Loftus <i>v.</i> Hopwood	40	compte	462
Lonchamp <i>v.</i> Goodfellow 19		Masterman <i>v.</i> Maberly	13
Long <i>v.</i> Symes	122	Matthias, In goods of	145
Longhurst, In goods of 258		Maule <i>v.</i> Maule	160
Lovegrove, In goods of	17	May, In goods of	100
Lovett <i>v.</i> Lovett	39, 40	Maychell, In goods of	229
Lowe, In goods of	86, 114	Mayd, In goods of	17
—— <i>v.</i> Jolliffe	28	Mayhew <i>v.</i> Newstead	171
Lowry, In goods of	112	Meddoweroft <i>v.</i> Hughenin .. 103	
Lucas <i>v.</i> Lucas	248	Medlycott <i>v.</i> Assheton	98
Luce, In goods of	222	Meek <i>v.</i> Durham	223
Ludlow, In goods of	178	Mellor, In goods of	224
Luke, In goods of	145	—— <i>v.</i> Dyson	224
Lush, In goods of	111	Menzies <i>v.</i> Pulbrook ..219, 221, 366	
Lushington <i>v.</i> Onslow	91	Mercer, In goods of	141
Lynch <i>v.</i> Provisional Govern-		—— <i>v.</i> Morland	211
ment of Paraguay	186	Merritt, In goods of	89, 114
		Merryweather <i>v.</i> Turner 367	
		Metcalfe, In goods of	257

	PAGE
Metcalfe, Re	41
Metropolitan Electric Light Company, In re	467
Mette v. Mette	84
Michell v. Thomas	33
Middlehurst v. Johnson	18, 73
Middleton, In goods of ..	97, 208, 240
—— v. Forbes	36
Miles, In goods of	54, 260
Miller, In goods of	130
—— v. James	184, 189
Milligan, In re	81
Mills v. Millward	95
Milnes, In goods of	253
—— v. Foden	12, 14, 53, 190
Ming v. Ming	378
Minshull, In goods of	231
Mitchell v. Gard	544, 548
—— v. Thomas	19
Mitcheson, In goods of	97, 98
Montefiore v. Montefiore ..	28, 154
Montgomery, In goods of	112
Moore, In goods of ..	108, 207, 438
—— v. Barber	51
—— v. Holgate	370
—— v. King	67
—— v. Moore	160
—— v. Whitehouse	154
Morant, In goods of	123
Mordaunt v. Clarke	123, 495
Morehouse v. Lord	90
Morell v. Morell	20, 80
Morgan, In goods of ..	13, 86, 114, 131, 476
Morley, In goods of	219
Morris, In goods of ..	79, 245, 316
—— v. Freeman	534
Morrison, In goods of	175
Morritt v. Douglas	73
Mortimer v. Paull	435
Morton, In goods of	15, 94, 127
—— v. Thorpe	212
Moss v. Bardswell	117
Mountain v. Bennett	33, 35, 41
Mudge v. Adams	54, 400
Mudway v. Croft	28
Muir, In goods of	196
Mumford v. Shufflebotham ..	445
Mundy, In goods of	15
Murfett v. Smith	29, 451
Murray, Robert, In goods of.	348
Mustapha, In goods of	247
Mustow, In goods of	77
Myers v. Gibson	77
Mynn v. Robinson	39, 40

N.

	PAGE
Nadin v. Bassett	463
Nares, In goods of	207
Nash v. Yelloly	551
Nathan v. Morse	150
Naylor, In goods of	210
—— v. Stainsby	117
Nelson v. Oldfield	36
Newbold, In goods of	207
Newcome v. Beloe	171
Newsom, In goods of	366
Newstead, In goods of	182
Newton v. Clarke	76
—— v. Newton	100
Nicholls v. Binns	27, 370, 550
—— v. Nicholls	15
Nickalls, In goods of	131
Nicks, In goods of	76
Noble v. Phelps	48, 49
—— v. Willock	48, 49
Noddings, In goods of	121, 122
Noel, In goods of	224
Norman v. Bourne	221
—— v. Strains	458
Norris, In re	138
——, In goods of	345, 347
—— v. Allen	488
Northey v. Cock	432
Norton v. Reilly	39, 41

O.

O'Brien, In goods of	218
O'Byrne, Re	315
Oddy, In goods of	263
O'Dwyer, In goods of	52
—— v. Geare	52, 125
O'Loughlin, In goods of	178
Oldenburg (Prince), In goods of	259
Olding, Re	67
Oliphant, In goods of	113, 176
Oliver, In goods of	69
Onions v. Tyrer	96
Onslow v. Cannon	551
Orange v. Pickford	77
Oranmore (Lord), In goods of.	204
O'Reilly, In goods of	115
Ormond, In goods of	219
Orton v. Smith	542, 546
O'Shea v. Wood	428
Osmond v. Fitzroy	33
Oswald, In goods of	152
Ouchterlony, In goods of	144
Owen v. Davis	405
—— v. Williams	78, 477

P.	PAGE
Paglar <i>v.</i> Tongue	54
Palmer, In goods of	136
Panton <i>v.</i> Williams	41
Parfitt <i>v.</i> Lawless....	40, 41, 42, 46
Parker, In goods of	16, 82, 312, 318
—— Dearing and Brooks, In re	438
—— <i>v.</i> Duncan	36, 44
—— <i>v.</i> Felgate	19, 33
—— <i>v.</i> Hickmot	164
Parkinson <i>v.</i> Thornton	496
Parnell, In goods of	244
Parr, In goods of	167
Parsons <i>v.</i> Lanoe	16
Partington <i>v.</i> Att.-Gen.	205
Parton <i>v.</i> Johnson	366, 405
Pascall, In goods of	147
Paske <i>v.</i> Ollatt	19
Patrick, In goods of	335
Patten <i>v.</i> Poulton	99, 154
Patteson <i>v.</i> Hunter	242
Paxton, In goods of	316
Payer, In goods of	182
Payne <i>v.</i> Trappes	100
Peabody, In goods of	132
Peach, In goods of	64, 162
Peacock <i>v.</i> Lowe	370, 431
—— <i>v.</i> Monk	51
Pearn, In goods of	65
Pearse, In goods of	67, 148
Pearson <i>v.</i> Pearson	73, 74
Pearsons, In goods of	71
Pechell <i>v.</i> Hilderley	193
—— <i>v.</i> Jenkinson	82
Peck, In goods of	229, 246, 346
Peeham <i>v.</i> Newton	15
Peel, In goods of	115
Pegg <i>v.</i> Chamberlain	242, 256
Pennant <i>v.</i> Kingscote	67
Pennington, In goods of	82
Penny, In goods of	224, 254
Percival <i>v.</i> Cross	372
Perkes, Doe <i>d.</i> <i>v.</i> Perkes	93
Perrott <i>v.</i> Perrott	97
Perry <i>v.</i> Dyke	212
—— <i>v.</i> The Queen	198
Petchell, In goods of	88, 133
Peters <i>v.</i> Tilly	555
Phene, Re	347
Phillips <i>v.</i> Longbourne	19
Phillips, In goods of	253, 255
—— <i>v.</i> Jenkins	53
Phipps, In goods of	80
—— <i>v.</i> Hale	67, 79
Pickering <i>v.</i> Towers	110

	PAGE
Pigott, In goods of	245
Pile, In goods of	178
Pine, In goods of	179
Playne <i>v.</i> Scriven	70
Plenty <i>v.</i> West	86, 87, 88
Podmore <i>v.</i> Whatton	98, 153, 175
Pool, In goods of	175
Porter, In goods of	16
Portland (Duke of) <i>v.</i> Bingham	103
—— <i>v.</i> Prodgers	54
Potts, In goods of	313
—— <i>v.</i> Potts	415
Powell, In goods of	65
—— <i>v.</i> Powell	97, 399, 406
Power <i>v.</i> Bailey	51
Powis, In goods of	310
Prendergast, Re	79
Presant <i>v.</i> Goodwin	177
Preston <i>v.</i> Melville	184
Price, In goods of	57, 126, 260
——, In re	48, 56
—— <i>v.</i> Parker	49
—— <i>v.</i> Powell	92
Pridham, In goods of	305
Priestman <i>v.</i> Thomas	324, 477
Prinsep <i>v.</i> Dyce Sombre	33
Probart, In goods of	184, 204
Prosser <i>v.</i> Bank of England ..	347
Prothero, In goods of	256, 258
Prudential Assurance Co. <i>v.</i> Edmonds	347
Pryor <i>v.</i> Pryor	69
Puddephatt, In goods of	64
Pulman, In goods of	118
Punchard, In goods of	112
Purdey <i>v.</i> Field	434, 436

Q.

Queen's Proctor <i>v.</i> Wallis	402
—— <i>v.</i> Williams ..	402, 435
Quick <i>v.</i> Quick	99, 154, 372
Quihampton <i>v.</i> Going	141
Quincey <i>v.</i> Quincey	100

R.

Radnall, In goods of	225, 261
Raffenel, In goods of	191
Raine, In goods of	17, 168
Ratcliffe <i>v.</i> Barnes	536
Rawlings, In goods of	86
—— <i>v.</i> Emmerson	431

	PAGE
Rawlings <i>v.</i> Jennings	176
Rawlinson <i>v.</i> Burnell	220
Rayson <i>v.</i> Parton	535, 554
Read, In goods of	183, 187
Reay, In goods of	170
Reed, In goods of	305
Rees, In goods of	76
— <i>v.</i> Rees	79, 143
Reid, In goods of	84, 147, 192, 324
Rennie <i>v.</i> Massie	535
Repington <i>v.</i> Holland	16, 182
Reus-Kostritz, Henry 69th of, In goods of	477
Rex <i>v.</i> Bettesworth	49
— <i>v.</i> Luffe	211
— <i>v.</i> Wright	26
Reynolds, In goods of	86, 100
Rhodes, In goods of	213
Rhodes, Re	347
— <i>v.</i> Rhodes	21
Rich <i>v.</i> Cockell	51
Richards, In goods of	207, 211, 230, 256
— <i>v.</i> Hough	463
— <i>v.</i> Humphreys	536
Richardson, In goods of	228
Ridge <i>v.</i> Ridge	445
Ridgway <i>v.</i> Abingdon	410, 446
— <i>v.</i> Darwin	33
Riding <i>v.</i> Hawkins	37, 38, 411, 449, 453
Rigg <i>v.</i> Hughes	336, 399, 479, 483
Right <i>d.</i> Cater <i>v.</i> Price	76
Ripley, In goods of	99, 154
Rippon, In goods of	192
Risdon, In goods of	222, 238
Risley <i>v.</i> Shepherd	347
Roadnight <i>v.</i> Carter	457
Robarts, In goods of	127, 130
Roberts, In goods of	230
— <i>v.</i> Cowmeadow	535
— <i>v.</i> Phillips	67, 68
— <i>v.</i> Roberts	16
Robertson <i>v.</i> Powell	85, 89
— <i>v.</i> Smith	13, 130
Robins <i>v.</i> Dolphin	544, 548
Robinson, In goods of	13, 14, 17, 418
— <i>v.</i> Clarke	86, 133
Robson, In re	14
— <i>v.</i> Robson	553
Rodd <i>v.</i> Lewis	19
Roeters <i>v.</i> Cotton	212
Rogers <i>v.</i> Goodenough	85, 99, 100, 128
Rogerson, In goods of	188
Rosbotham <i>v.</i> Rosbotham	399
Rose, In goods of	9

	PAGE
Rosser, In goods of	218
Rotton, In goods of	133
Rowley v. Merlin.....	160
Ruddy, in goods of.....	251
Rule, In goods of ..,173, 191,	218
Russell, In goods of	85
Ryde, In goods of	117, 196
Ryder, In goods of.....	117
Ryves v. Att.-Gen.	465

52

Salisbury (Lord) <i>v.</i> Nugent ..	395
Saloin <i>v.</i> Hayes	182
Samson, In goods of ..	181, 228, 253
Satterthwaite <i>v.</i> Powell ..	347, 348
Saunders, In goods of	81, 110
— <i>v.</i> Evans	457
Savage, In goods of	98, 127
— <i>v.</i> Blythe	241
Sawbridge <i>v.</i> Hill	175
Sawtell, In goods of	175, 179
Scale, John	212
Scammell <i>v.</i> Wilkinson	49
Scarborough, In goods of ..	176, 177
Scarlett, In goods of	172, 254
Scarman <i>v.</i> Collins	42
Schneider <i>v.</i> Norris.....	61
Schwerdtfeger, In goods of ..	225, 262
Scott <i>v.</i> Scott	97
Scruby <i>v.</i> Fordham	27, 34
Seaton <i>v.</i> Sturch	540
See, In goods of	180, 229
Sefton <i>v.</i> Hopwood	33, 39
Selwyn, In goods of	347
Seymour's (Lord) case	81
Shallcross, Doe <i>d.</i> <i>v.</i> Palmer ..	160
Sharman, In goods of ..	71, 152, 177
Shawe <i>v.</i> Marshall	550
Shearn, In goods of	164
Sheffield <i>v.</i> Sheffield	541, 545
Sheldon <i>v.</i> Sheldon	139
Shepherd, In goods	176, 177
— <i>v.</i> Beetham	368
Shepherd, In goods of ...	218, 432
Sherwood <i>v.</i> Sanderson	33
Shires <i>v.</i> Glascock	76
Short <i>d.</i> Gastrell <i>v.</i> Smith ..	96, 97
Shuttleworth, In goods of ..	62
Sidebottom <i>v.</i> Sidebottom	178
Simmons <i>v.</i> Deane	496
Simpson, In goods of	93
Sims, In goods of	146
Singleton <i>v.</i> Tomlinson ..	138, 149, 535

	PAGE		PAGE
<i>Skipper v. Bodkin</i>	552	<i>Stoddart v. Grant</i>	87
— <i>v. Skipper</i>	552	<i>Stoer, In re, Bute (Marquis of)</i>	
<i>Slade, In goods of</i>	93	<i>v. James</i>	463
<i>Slater v. Alvey</i>	489	<i>Stracey, In goods of</i>	17
— <i>v. May</i>	248, 251	<i>Stratton v. Ford</i>	432
<i>Slinn, In goods of</i>	14	— <i>v. Linton</i>	211
<i>Slumbers, In goods of</i>	255	<i>Streaker, In goods of</i>	82
<i>Sly v. Sly</i>	154	<i>Streatley, In goods of</i>	68
<i>Smart, In goods of</i>	132	<i>Stretch v. Pynn</i>	220
<i>Smee v. Smee and Corp. of</i>		<i>Stuart v. Balkis Company</i> ...	467
<i>Brighton</i>	26, 28, 29	— <i>v. Lord Kirkwall</i>	51
<i>Smith, In goods of</i> ..16, 49, 69, 112,		<i>Sturgis v. Corp</i>	51
168, 178, 184, 189, 230		<i>Sturton v. Willock</i>	160
—, <i>In re</i>	58, 126	<i>Sugden v. St. Leonards</i> ...89, 90,	
—, <i>John</i>	125	99, 153, 154, 155	
— <i>v. Atkins</i>	453, 550	<i>Summerell v. Clements</i>	538
— <i>v. Fletcher</i>	539	<i>Summers, In goods of</i>	73
— <i>v. Harris</i>	63	<i>Sunderland, In goods of</i>	146
— <i>v. Hopkinson</i>	549	<i>Surtees, In goods of</i>	416
— <i>v. Pryce</i>	221	<i>Sutherland, In goods of</i>	201
— <i>v. Smith</i>	71, 538, 552	<i>Sutton v. Drax</i>	543, 547, 549
— <i>v. Tebbitt</i>	28, 366	— <i>v. Sadler</i>	19, 26
<i>Smithson, In goods of</i>	223	— <i>v. Smith</i>	435
<i>Smyth, In goods of</i>	346	<i>Sweetland v. Sweetland</i>	67
— <i>v. Wilson</i>	549	<i>Swinfen v. Swinfen</i> ..33, 543, 547	
<i>Snape v. Webb</i>	171	<i>Swinford, In goods of</i>	78
<i>Socket v. Wray</i>	51	<i>Swinton v. Bailey</i>	157
<i>Solicitor to the Treasury v.</i>		<i>Sykes, In goods of</i> ..99, 115, 154,	
<i>White</i>	463	160	
<i>Somerset, In goods of</i> 256, 257		<i>Symes v. Appelbee</i>	142
<i>Sotherton v. Dening</i>	54	— <i>v. Green</i>	26
<i>Southall v. Jones</i>	16		
<i>Southmead, In goods of</i> ..253, 254			
<i>Southwell v. Findlay</i>	230		
<i>Sowerby, In goods of</i>	205		
<i>Sperling, In goods of</i>	69, 70		
<i>Spratt v. Harris</i>	183		
<i>Sprigg v. Banks</i>	416		
<i>St. Helens (Lord) v. Marchio-</i>			
<i>ness of Exeter</i>	100		
<i>Staines v. Stewart</i>	154		
<i>Stainton, In goods of</i>	172		
<i>Standen v. Edwards</i>	41		
<i>Stanley v. Bernes</i>	432		
<i>Stanton v. Lambert</i>	203		
<i>Stark, In goods of</i>	318		
<i>Steadman v. Powell</i>	48		
<i>Stedham, In goods of</i> 101, 134			
<i>Steed v. Calley</i>	26		
<i>Steele, In goods of</i> 86, 100, 128			
<i>Stephens, In goods of</i>	135		
— <i>v. Taprell</i>	91		
<i>Stephenson, In goods of</i> ..203, 244			
<i>Stewart, In goods of</i> ..15, 112, 180,			
188, 225, 262			
<i>Stoakes, In goods of</i>	79		
<i>Stockil v. Punshon</i>	147		
<i>Stockwell v. Ritherdon</i>	94		

T.

<i>Tagart v. Hooper</i>	98
<i>Tappenden v. Walsh</i>	51
<i>Tate v. Tate</i>	461
<i>Tatham v. Wright</i>	26
— <i>v. Cattamore</i>	160
<i>Tatnall v. Hankey</i>	53
<i>Taylor v. Dening</i>	61
— <i>v. Diplock</i>	182, 348
— <i>v. Meade</i>	60
— <i>v. Taylor</i>	437, 538
<i>Taynton v. Hannay</i>	251
<i>Teague v. Wharton</i>	181, 227
<i>Tennant v. Cross</i>	366, 537
<i>Thacker, In goods of</i> 204, 316	
<i>Tharp, In goods of</i>	373
— <i>v. McDonald</i>	53
<i>Thomas, In goods of</i>	77
— <i>v. Crowther</i>	554
— <i>v. Jones</i>	48
— <i>v. Nurse</i>	488

	PAGE
Thompson, In goods of	74, 75, 226, 296
Thomson, In goods of	73, 128
Thorncraft <i>v.</i> Lashmar..	16, 543, 547
Thorne, In goods of	16, 81
—— <i>v.</i> Rooke.....	549
Thornton, In goods of	95
Threlfall <i>v.</i> Wilson.....	553
Thynne (Lord John) <i>v.</i> Stan-	
hope	97
Tichborne <i>v.</i> Tichborne ..	436, 552
Tilly <i>v.</i> Trussler	229
Timbrell <i>v.</i> Rice	221
Timewell <i>v.</i> Perkins	176
Tinnuchi <i>v.</i> Smart	496
Tippett <i>v.</i> Tippett	537
Todd <i>v.</i> Simpson	411
Tomkins, In goods of	52, 125, 332, 350, 376
Tomlinson, In goods of ..	52, 125, 350, 374
—— <i>v.</i> Gilby	223
Toomy, In goods of	112
Topping, In goods of	367, 553
Tovey, In goods of	149
Townley <i>v.</i> Watson	96, 157
Tracy, In goods of	111
Treeby, In goods of	168
Treloar <i>v.</i> Lean and others ..	96
Trevannion, In goods of	70
Trevelyan <i>v.</i> Trevelyan....	99, 154
Tribe <i>v.</i> Tribe	76
Trimlestown <i>v.</i> D'Alton	36, 39
Trimnel, In goods of	76
Truro (Lady), In goods of....	140
Tucker, In goods of.....	183, 258
—— <i>v.</i> Inman	48, 49
Tugman <i>v.</i> Hopkins	52
Tupper <i>v.</i> Tupper	89
Turner, In goods of	98, 136, 204, 229, 258, 347
Turnock <i>v.</i> Turnock	211
Tweedale, In goods of	82, 161
Twells <i>v.</i> Clarke	410
Twyford <i>v.</i> Trail	237
Tyer <i>v.</i> Bell	183
Tyler <i>v.</i> Merchant Taylors' Co.	164
Tyndale, In goods of	229

U.

Underwood <i>v.</i> Wing.....	347, 349
Utterton <i>v.</i> Robins	139

V.

	PAGE
Vallance <i>v.</i> Vallance	99, 154
Vea Murguia, In goods of ..	237
Veiga, In goods of	123
Velho <i>v.</i> Leite	118
Viesca <i>v.</i> D'Aramburu	187
Vinnicombe <i>v.</i> Butler	76
Vivian <i>v.</i> Kennelly	537
Von Buseck, In goods of	23
Von Desen, In goods of.....	220
Von Stentz <i>v.</i> Comyn	41

W.

Wagstaff <i>v.</i> Smith	51
Wainwright, In goods of	348
Wakeham, In goods of	113
Walker, In goods of	65
——, Re.....	347, 497, 501
—— <i>v.</i> Carless	210
—— <i>v.</i> Crystal Palace	530
—— <i>v.</i> Wollaston	432
Wallich, In goods of	118
Wallis <i>v.</i> Maughan.....	34
Walpole <i>v.</i> Cholmondeley	100
—— <i>v.</i> Orford	100
Wanney <i>v.</i> Williams	41
Ward <i>v.</i> Huckle	368
Ware <i>v.</i> Claxton	410
Waring <i>v.</i> Waring	27
Warner <i>v.</i> Moses.....	463
Warren, In goods of	180
Warrender <i>v.</i> Warrender	84
Warter <i>v.</i> Warter	84, 382
Warwick (Earl of) <i>v.</i> Greville..	209, 210
Waters, In goods of	171
—— <i>v.</i> Thorne.....	41
Watkins, In goods of.....	144
Watson, In goods of.....	174, 256, 260
——, In re, Carlton <i>v.</i> Carl-	
ton	193
—— <i>v.</i> Tomkins	495
Watts, In goods of	239, 256, 257
Webb, In goods of	13, 131, 174, 245
—— <i>v.</i> Kirby	251
—— <i>v.</i> Needham.....	220
Webster, In goods of	198
—— <i>v.</i> Appleton.....	442
Wedderburne <i>v.</i> Solicitor-	
General	103
Weir, In goods of.....	244, 312
Welsh <i>v.</i> Phillips	154
Wenham <i>v.</i> Wensley	228
West, In goods of	62

	PAGE
West <i>v.</i> Goodrick	542, 546
— <i>v.</i> West	395
— <i>v.</i> Wilby	171, 182
Weston, In goods of	97
Westropp, In goods of	172
Wetdrill <i>v.</i> Wright	182
Wharram <i>v.</i> Wharram	99, 153, 154
Whatman, In goods of	86
Wheeler, In goods of	93, 349
— <i>v.</i> Alderson	19, 26, 33
Whiston, In goods of	173
Whitby <i>v.</i> Highton	53
White, In goods of	162, 228
— <i>v.</i> Driver	27
— <i>v.</i> Duvernay	393, 518, 538
— <i>v.</i> Repton	80
— <i>v.</i> White	36, 406
— <i>v.</i> Wilson	28
Whiteley <i>v.</i> King	98
Whitham, In goods of	122
Whiting <i>v.</i> Deal	212
Whittle <i>v.</i> Keats	436
Whyte <i>v.</i> Pollok	16
Widdrington, In goods of	140
Wilde, In goods of	238
Wilkins <i>v.</i> Pryer	54
Wilkinson, In goods of	162
— <i>v.</i> Corfield	543, 547
— <i>v.</i> Gordon	204
Williams, In goods of	65, 170, 225, 258, 552
— <i>v.</i> Ashton	159
— <i>v.</i> Davies	496
— <i>v.</i> Goude	27, 39, 41, 549
— <i>v.</i> Henry	552
— <i>v.</i> Jukes	221
— <i>v.</i> Tyley	92, 97
Willis <i>v.</i> Earl Beauchamp	407, 410
Willmott, In goods of	143
Wilson, In goods of	71
— <i>v.</i> Beddard	61
— <i>v.</i> De Coulon	463
— <i>v.</i> Wilson	463
Winchester's (Marquis of) case	33
Windeatt <i>v.</i> Sharland	222
Wingate, In goods of	196

	PAGE
Wingrove <i>v.</i> Wingrove	42, 44, 46
Winsor <i>v.</i> Pratt	97
Winter, In goods of	183
Wiseman <i>v.</i> Wiseman	539
Wood <i>v.</i> Wood	26, 90, 98
—, Thomas	345
Woodfall, In goods of	171
Woodhouse <i>v.</i> Balfour	66
Woodley, In goods of	63, 64
Woods, In goods of	113, 145, 146
Woodward, In goods of	93
— <i>v.</i> Goulstone	155
Woolley <i>v.</i> Gordon	258
Worman, In goods of	53, 203
Wormington, In goods of	174
Worthington, In goods of	84
Wotton, In goods of	65
Wray, In goods of	67
Wrench <i>v.</i> Murray	28
Wright, In goods of	65
—, Doe <i>d. v.</i> Manifold	76
— <i>v.</i> Rogers	76, 436, 477, 481
— <i>v.</i> Rutherford	365
— <i>v.</i> Sanderson	77
Wyatt, In goods of	164
Wyckoff, In goods of	225, 262
Wycherley <i>v.</i> Andrews	458

Y.

Yockey, In goods of	144
Young, In re	48
—, In goods of	319
— <i>v.</i> Dendy	28
— <i>v.</i> Ferrie	369
— <i>v.</i> Holloway	421, 428, 431
— <i>v.</i> Hughes	317
— <i>v.</i> Oxley	318

Z.

Zacharias <i>v.</i> Collis	45, 46
Zeally <i>v.</i> Veryard	489



ON THE
PRINCIPLES AND PRACTICE
OF THE

Probate, Divorce and Admiralty Division

IN GRANTING PROBATE AND ADMINISTRATION
OF THE PERSONAL ESTATE AND EFFECTS
OF DECEASED PERSONS.

CHAPTER I.

OF THE CONSTITUTION OF THE COURT.

PREVIOUS to the year 1857 the entire jurisdiction with respect to probate and administration of the personal estate and effects of deceased persons, was exercised in this country by the Ecclesiastical Courts. In the latter year, however, the Court of Probate was created (*a*), and to it was transferred the entire testamentary jurisdiction of all ecclesiastical and other Courts, professing to exercise any such jurisdiction, in England and Wales. This tribunal retained the exclusive jurisdiction in all such matters until it was finally abolished, and at the same time resuscitated under the title of the Probate, Divorce and Admiralty Division of her Majesty's High Court of Justice by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), but as the scope of this work is confined to the practice of this Division in probate matters, the shorter title of the "Probate Division" will generally be used.

By sect. 3 of this Act the Court of Probate is made part

Previous to
1857.

From 1857 to
1875.

Merger of
Court of Pro-
bate into
Supreme
Court.

(*a*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

Y

Division of
Supreme
Court into
High Court
of Justice and
Court of
Appeal.

Judge of
Probate Court
appointed
judge of High
Court.

Saving of his
rights and
privileges.

Transfer of
jurisdiction of
Court of Pro-
bate to High
Court of
Justice.

Rules as to
exercise of
jurisdiction.

Probate Divi-
sion made one
of the divi-
sions of the
High Court.

of the Supreme Court of Judicature in England, and sect. 4 divides the Supreme Court into "her Majesty's High Court of Justice" and "her Majesty's Court of Appeal."

By sect. 5, the judge of the Court of Probate is appointed one of the first judges of her Majesty's High Court of Justice, and by sect. 11 all his rights and privileges are specially retained, subject to any change effected in his jurisdiction and duties by the Act.

Sect. 16 provides for the transfer to the High Court of Justice of the jurisdiction (amongst others) of the Court of Probate, and it defines the jurisdictions so transferred in the following terms:—"The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said Courts respectively sitting in Court or Chambers or elsewhere when acting as judges or a judge, in pursuance of any statute, law, or custom, and all powers given to any such Court or to any such judges or judge by any statute; and also all ministerial powers, duties, and authorities incident to any and every part of the jurisdiction so transferred."

By sect. 23, all jurisdictions transferred by the Act to the High Court of Justice and the Court of Appeal shall, in so far as regards procedure and practice, be exercised in the manner provided by the Act, or by such rules and orders of Court as may be made pursuant to the Act.

In the absence of any such special provision such jurisdictions shall be exercised, as nearly as may be, in the same manner as the same might have been exercised by the respective Courts previous to the passing of the Act.

Sect. 31 divides the High Court of Justice into five divisions—namely, the Chancery, Queen's Bench, Common Pleas, Exchequer, and Probate, Divorce and Admiralty Divisions—but of these the Common Pleas and Exchequer Divisions have been abolished by Order in Council, dated

December, 1880, so that at the present day the High Court of Justice comprises the remaining three divisions only.

Sub-sect. 5 of the same section provides that it "shall consist of two judges who, immediately on the commencement of this Act, shall be the existing judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, and the existing judge of the High Court of Admiralty;" and the judge of the Court of Probate is further appointed president of the Division.

Judge of
Court of
Probate to be
president of
Division.

Sect. 32 gives power to her Majesty in Council, upon any report or recommendation of the council of judges (*d*) of the Supreme Court, to reduce or increase the number of the divisions of the High Court of Justice or of the judges of such divisions, but no order made under the authority of this section can come into operation until it has been laid before each House of Parliament for thirty days on which that House shall have sat, nor if, within such period of thirty days an address is presented to her Majesty by either House of Parliament praying that the same may not come into operation. The total number of the judges of the Supreme Court can neither be reduced nor increased by any such order.

Power to in-
crease or re-
duce number
of judges by
Order in
Council.

Sect. 33 provides for the distribution of the business of the High Court of Justice amongst its several divisions, "in such manner as may from time to time be determined by any rules of Court or Orders of Transfer to be made under the authority of this Act;" and "every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the Division, or with the name of the judge to which or to whom the same is assigned."

Distribution
of business
amongst divi-
sions of High
Court.

By sect. 34, all causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty at the com-

Business to
be assigned
to Probate
Division.

(*d*) For the constitution of such Council, see Judicature Act, 1873, s. 75.

mencement of the Act; and all causes and matters which (if the Act had not passed) would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, are assigned to the Probate Division.

Powers of
judge.

By sect. 39, "any judge of the said High Court of Justice may, subject to any rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes or matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in Chambers respectively, by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any rules of Court to be hereafter made. In all such cases any judge sitting in Court shall be deemed to constitute a Court."

Probate
causes to be
heard in first
instance
before one
judge only.

By sect. 42, all business arising out of any cause or matter assigned to the Probate Division shall (subject to any rules of Court) be transacted and disposed of, in the first instance, by one judge only, "as has been heretofore accustomed in the Court of Probate."

Proviso as to
Divisional
Courts.

By sect. 44, Divisional Courts may be held for the transaction of any part of the business assigned to the Probate Division, which the judges of such Division, with the concurrence of the president of the High Court, deem proper to be heard by a Divisional Court.

Power to
judges of
other Divi-
sions to hear
probate
matters under
special cir-
cumstances.

It is further provided by the same section that any cause or matter assigned to the Probate Division, may be heard at the request of the president of such Division, with the concurrence of the president of the High Court—namely, the Lord Chancellor—by any other judge of the High Court.

Re-appoint-
ment of
officers.

The Court of Probate Acts, 1857 and 1858, appoint four registrars, two record keepers, and one sealer for the principal registry, one district registrar for each district registry, and clerks and other officers, as the judge may

think fit, and these officers are all re-appointed by sect. 77 of the Supreme Court of Judicature Act, 1873.

The Court of Probate (now merged in the Probate Division) was, as we have seen, created by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

By sect. 4 of that statute "the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons now vested in or which can be exercised by any Court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall, except as hereinafter is mentioned, be exercised in a Court to be called the Court of Probate."

Testamentary jurisdiction to be exercised by a Court of Probate.

The exception alluded to refers to suits for legacies and the distribution of residues, which were formerly entertained by the Ecclesiastical Courts, but are expressly exempted from the jurisdiction of the Probate Court by the 23rd section of the Act, and, for all practical purposes, they may now be said to be within the exclusive jurisdiction of the Chancery Division.

Suits for legacies and distribution of residues.

Sect. 23 of the Act of 1857 provided that the Court of Probate should be a Court of Record, and have the same powers, and its grants and orders the same effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury, and its grants and orders respectively, had at the time of the passing of the Act in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary and those effects of deceased persons within the jurisdiction of the said Prerogative Court; and all duties which, by statute or otherwise, were then imposed on or performed by ordinaries generally, or on or by the said Prerogative Court in respect of probates, administrations, or matters or causes testamentary within

Court of Probate to have powers of Prerogative Court.

their respective jurisdictions, were to be performed by the Court of Probate, with the single exception before mentioned.

A large proportion of the before-mentioned jurisdiction may be and is exercised without question. A testator may make his will, and all parties concerned may acquiesce in his right and capacity to do so, but before the will can be formally approved, it must receive the stamp and authority of the Probate Division, which has to be judicially satisfied that the will propounded is really a will and the will of the deceased. Of course where no question is raised by anyone, the proceedings are generally easy and simple; such proceedings are called non-contentious, common form, or voluntary, meaning the same thing, and defined by the 2nd section of the Act to be the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probate and administrations through the registry in contentious cases where the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

Non-contentious business.

Questions of difficulty to be referred to the Court on motion.

If any question of difficulty arises in the course of obtaining probate or administration in the principal registry, the registrar may and generally does direct it to be brought before the judge in open Court on motion. Should it arise in the country the district registrar is not allowed to decide it himself, but he is directed by sect. 50 to "transmit a statement of the matter in question to the registrars (*i.e.* the principal registrars) of the Court, who shall obtain the directions of the judge in relation thereto."

Contentious business.

The will propounded may, however, be contested on various grounds, such as incapacity, undue influence, informal execution, subsequent revocation, &c. &c.; or, if the deceased die intestate, a contest may arise as to whom

letters of administration should be granted. To proceedings in such cases the term contentious business is applied. And so various are the questions thus arising that the statute has not attempted to define them specifically, but has included under this term everything that is not common form, except the warning of caveats, which is neither contentious nor common form as far as the statute is concerned, though in the rules it is included with non-contentious business.

By sect. 58 of the Act of 1857 a right of appeal is given in certain cases to the Court of Probate from the decisions of County Court judges. Appeal from
County Court.

By Ord. LIX. r. 4 (Rules of the Supreme Court, 1883), "appeals from the decisions of County Courts in probate and administration actions lie to the Divisional Court of the Probate, Divorce, and Admiralty Division."

By sect. 2 of 54 & 55 Vict. c. 53, "whenever there is a vacancy in the office of a judge of the High Court who is president of the Probate, Divorce, and Admiralty Division thereof, it shall be lawful for her Majesty, by letters patent, to appoint to that office as president of the said division any person who is a barrister of not less than fifteen years' standing, or who is a judge of the High Court or Court of Appeal, and the person so appointed shall, without prejudice to the rights of any judge of the Supreme Court existing at the passing of this Act, take precedence in Court next after all ordinary judges of the Court of Appeal appointed before the time at which he shall become an ordinary or ex-officio member thereof." President of
Probate,
Divorce, and
Admiralty
Division.

By sect. 11, sub-sect. 3, Judicature Act, 1875 (38 & 39 Vict. c. 77), subject to rules of Court, a person commencing any cause or matter shall not assign the same to the Probate Division, unless he would have been entitled to commence the same in the Court of Probate previous to the passing of the Act. Prohibition
against
assigning
irrelevant
matters to
Probate Division.

Sect. 18 provides that "all rules and orders of Court Existing rules

and orders continued where not inconsistent with Act.

in force at the time of the commencement of this Act in the Court of Probate except so far as they are expressly varied by the first schedule hereto, or by rules of Court made by order in council before the commencement of this Act, shall remain and be in force in the Probate Division of the High Court of Justice, until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act."

Powers of president of Division as to common form business.

The same section further provides that "the president for the time being of the Probate and Divorce Division of the High Court of Justice shall have, with regard to non-contentious or common form business of the Probate Court, the powers now conferred on the judge of the Probate Court by the Probate Act of 1857, s. 30."

Commissioners to administer oaths.

By sect. 82, Judicature Act, 1873, all persons who, previous to the Act, were commissioners to administer oaths in any of the superior Courts, are empowered to act in the same capacity in the Supreme Court; and by sect. 87, solicitors, attorneys, and proctors are, from the commencement of the Act, to be known only as solicitors of the Supreme Court.

Solicitors.

The old rules for the contentious business of the Probate Court have been affected to a very great extent by the coming into force of the Supreme Court Rules of 1883, but not the rules for non-contentious business.

Concurrent jurisdiction. Judicature Act, 1873, s. 24, sub-sects. 6 and 7. Legal rights.

By the Judicature Act, 1873, s. 24, sub-ss. 6 and 7, the Probate Division has concurrent jurisdiction with the other divisions of the High Court.

"(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom, or created by any statute, in the same manner

as the same would have been recognized and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.

“(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.”

Finality of proceedings.

CHAPTER II.

OF THE NATURE AND FORM OF A WILL (*a*).

Of the power
of disposing of
real and per-
sonal estate.

“FROM the time of the Norman Conquest to the passing of the Statutes of Wills (32 and 34 Hen. 8), a subject of this realm had, generally speaking, no testamentary power over land.” He had, however, the power of making a will disposing of his *personal estate*, under which term were included “terms for years and chattels real,” which were deemed personalty “on account of their original imbecility and insignificance” (*b*).

This power would, however, appear to have been at one time limited, “for by the common law, as it stood according to Glanvil in the reign of Hen. II., a man’s goods were to be divided into three equal parts: one of which went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife he might then dispose of one moiety, and the other went to his children, and so, *e converso*, if he had no children, the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal” (*c*).

This limitation was, however, gradually abolished until the power to dispose freely of personal estate became general throughout England; and now by sect. 3 of the Wills Act (1 Vict. c. 26) it is enacted “that it shall be lawful for every person to devise, bequeath, or dispose of by his will, executed in manner hereinafter required, all

(*a*) See Wms. on Exors. 9th ed.
pp. 1—12, and pp. 62—106.

(*b*) *Ibid.* p. 1.

(*c*) *Ibid.* pp. 1, 2.

real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death."

Previous to the passing of this enactment a man could devise only such lands as he possessed at the time of making his will, and no after-acquired lands would pass whatever words were used; although his will would pass "whatever personal estate he died possessed of, whether acquired before or after the date of the instrument." "For a devise of lands is considered by our Courts not so much in the nature of a testament, as a conveyance by way of appointment of particular lands to a particular devisee" (d).

Swinburne defines a last will and testament to be "The just sentence of our will touching that which we would have done after our death" (e). What is a will.

1. It must be "just," meaning lawful, solemn and complete.

2. It must be "*the sentence*," i. e., the advised purpose or destination of the testator's mind.

3. It must be "*of our will*," i. e., "of our free will," not urged by violence or threats, or misled by fraud.

4. It must be to take effect on our death, "for the testament respecteth that which is to be performed after the death of the testator, and, therefore, so long as he liveth, the testament is of no force; but doth take its strength and is confirmed by the testator's death."

Lastly, it must, at the present day, be duly executed, in accordance with the law of England or of the land in which it is made; and all wills made in England bearing date on or after January 1, 1838, must be executed in accordance with the provisions of the Wills Act (1 Vict. c. 26).

At one time the appointment of an executor was essential to a testament, though even at that period "an instrument which would have amounted to a testament if an executor had been appointed was recognised as obligatory on him" Codicil—old interpretation of word.

(d) *Ibid.* p. 4.

(e) *Ibid.* p. 4.

Codicil—

who had the administration of the goods of the deceased, under the appellation of a codicil: which is accordingly defined by Swinburne and Godolphin to be ‘the just sentence of our will, touching that which we would have done after our death, without the appointing of an *executor*,’ and hence a codicil was called ‘an unsolemn will.’ It was termed ‘codicil,’ ‘codicillus,’ as a diminutive of a testament, ‘codex’ ” (f).

Modern interpretation of word.

In the modern acceptation of the term, however, a codicil is “an addition made by the testator, and annexed to, and to be taken as a part of, a testament, being, for its explanation or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator,” and as such it becomes part of the will, the two together making but one testament (g).

Testamentary form not necessary.

“Although much greater strictness seems to have prevailed in earlier times, it has been decided in a great variety of modern instances, that it is not necessary that an instrument should be of a testamentary form in order to operate as a will; indeed, it may be considered as a settled point that the *form* of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death, and the paper is duly attested in accordance with the Wills Act, 1 Vict. c. 26 ” (h).

Wording of testamentary paper.

Neither is the wording of the instrument material, for it is not necessary that directions “how property should be disposed of after death should be in direct and imperative terms; wishes and requests have been deemed sufficient” (i).

Language used, English or foreign.

“It is immaterial in what language a will is written, whether in Latin, French, or any other language. If the testator be a domiciled Englishman, the effect of the

(f) Wms. on Exors. 9th ed. p. 5.

Milnes v. Foden, 15 P. D. 105; 59 L. J., P. D. & A. 62; 62 L. T. 498.

(g) *Ibid.* p. 6.

(h) *Ibid.* pp. 93, 94. See also *In the goods of Colyer*, 14 P. D. 48;

(i) Wms. on Exors. 9th ed. p. 97.

foreign tongue employed can only be looked at to ascertain what are the equivalent expressions in English (*k*).

Neither are the materials important on which or by which a testamentary document is written. Nor is it material whether a testamentary document be drawn up and copied out by the hand of the testator himself or that of a third person by his direction.

Materials with which will written not material.

Even if the attorney or agent of the testator write a testamentary paper entirely in his own favour, the document is not thereby absolutely void (*l*); but “this circumstance creates a presumption against the act, and renders necessary very clear proof of volition and capacity as well as of knowledge by the testator of the contents of the instrument” (*m*).

But a man cannot make his will irrevocable even in express terms, for directly a document becomes irrevocable it ceases to be of a testamentary character, the essence of a will being that it is ambulatory during the life of the testator (*n*).

Cannot be irrevocable.

Even a paper not intended as a will, but as an instrument of a different nature, if it cannot operate in the latter, it may in the former character, so far as it is intended to take effect after the death of the person executing it (*o*).

Paper not intended as will may operate as such.

So, the following deed, which had been duly executed as a will, was held by the Court of Queen’s Bench to be a good devise of realty, the party executing it having died in India and left B. surviving:—“Know all men, that I make B. my lawful attorney for me, and in my name, and

Deed executed as a will.

(*k*) *Ibid.* p. 98.

(*l*) *Ibid.* pp. 98—103.

(*m*) *Ibid.* p. 99. See also *post*, pp. 38—45.

(*n*) See *Ibid.* p. 8; *In the goods of Robinson*, L. R., 1 P. & D. 384; 36 L. J., P. & M. 93; 17 L. T. 19.

(*o*) See *Masterman v. Maberly*, 2 Hagg. 247; *In the goods of Webb*,

3 S. & T. 482; 3 L. J., P. & M. 182; 11 L. T. 277; 10 Jur., N. S. 709; *In the goods of Morgan*, L. R., 1 P. & D. 214; 35 L. J., P. & M. 98; 14 L. T. 894; 14 W. R. 1022; *Robertson v. Smith*, L. R., 2 P. & D. 43; 39 L. J., P. & M. 41.

Deed executed as a will.

to my use to ask, demand, or receive the possession of or produce of the rent of the freehold, &c. And I do empower the said B. to hold and retain all proceeds of the property for her own use until I may return to England and claim possession in person; or in the event of my death, I hereby, in my name, assign and deliver to B. the sole claim to the property, to be held during her life, and disposed of as she may deem proper at the time of her death. At the same time, I wish it to be understood that I claim all right and title to the property on my arrival in Great Britain, when the term of B.'s occupancy shall be considered at an end" (p).

Principles deciding what is a will.

"The true principle to be deduced from the authorities appears to be that, if there is proof, either in the paper itself or from clear evidence *dehors*, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event that was to give effect to it; then, whatever may be its form, it may, assuming that there is execution in compliance with the Wills Act, be admitted to probate as testamentary" (q). For every testamentary paper entitled to operate as a will is also entitled to probate (r).

Therefore, in a recent case, a deed-poll, executed with the requisite formalities, was held to be entitled to probate as a will (s). And in a more recent case, the Court granted probate of a will, executed in the form of a deed, although

(p) *Doe d. Cross v. Cross*, 8 Q. B. 714; 15 L. J., Q. B. 217; 10 Jur. 564.

(q) *Wms. on Exors.* 9th ed. p. 95; *King's Proctor v. Daines*, 3 Hagg. 221; *Jones v. Nicholay*, 2 Robert. 288; *In the goods of Robinson*, L. R., 1 P. & D. 384; 36 L. J., P. & M. 93; 17 L. T. 19; *Milnes v. Foden*, 15 P. D. 105; 59 L. J., P. D. & A. 62; 62 L. T. 498.

(r) *King's Proctor v. Daines*, ante; *In the goods of English*, 3 S. & T. 586; 34 L. J., P. & M. 5; 11 L. T. 612; 13 W. R. 50.

(s) *Robson, In re, Emily v. Davidson*, 51 L. J., Chan. 337; 45 L. T. 418; 30 W. R. 257. See also *In the goods of Stinn*, 15 P. D. 516; 59 L. J., P. D. & A. 82; 63 L. T. 229; 39 W. R. 175.

the attesting witnesses had no precise recollection of the circumstances of its execution (*t*).

So, a paper containing a direction to executors (*u*), a letter addressed to a devisee (*x*), papers in the following terms:—"I wish my sister to have my bank book for her own use" (*y*); "I have given all I have to A. and her two sons" (*z*), orders on savings banks directing them to pay money to the wife of the deceased (*a*), having been duly executed, have been held to be testamentary, the Court being satisfied by evidence that they were not intended to take effect until after the death of the testator (*b*).

Examples of testamentary papers.

But a document duly executed but not disposing of any property, as a memorandum appointing guardians, or simply revoking a will, will not be entitled to probate (*c*).

On the other hand, however clearly testamentary a paper may appear on the face of it, it will not be admitted to probate if the Court be satisfied that it was not executed *animo testandi* (*d*); and if the purport of a document be equivocal, or if it be not on the face of it clearly testamentary, it lies on the person setting it up to show that it was executed *animo testandi* (*e*).

Documents not entitled to probate.

Burden of proof.

(*t*) *In the goods of Colyer*, 14 P. D. 48; 60 L. T. 368; 37 W. R. 272; 53 J. P. 134.

Jur., N. S. 417; 11 W. R. 540.

(*u*) *Bagnall v. Downing*, 2 Lee, 3.

(*x*) *In the goods of Mundy*, 2 S. & T. 119; 30 L. J., P. & M. 85.

(*y*) *Cock v. Cooke*, L. R., 1 P. & D. 241; 36 L. J., P. & M. 5; 15 W. R. 89.

(*z*) *In the goods of Coles*, L. R., 2 P. & D. 362.

(*a*) *In the goods of Marsden*, 1 S. & T. 542; 2 L. T. 87; 6 Jur., N. S. 405.

(*b*) See also *Peelham v. Newton*, 2 Lee, 46; *Chaworth v. Beech*, 4 Ves. 565; *In the goods of Hunt*, 2 Robert. 622; *In the goods of Stewart*, 3 S. & T. 192; 32 L. J., P. & M. 94; 9

(*c*) *In the goods of Morton*, 3 S. & T. 422; 33 L. J., P. & M. 87; 9 L. T. 809; 12 W. R. 32; *In the goods of Fraser*, L. R., 2 P. & D. 40; 39 L. J., P. & M. 20 (overruling *Brenchley v. Still*, 2 Robert. 162, and *In the goods of Hicks*, L. R., 1 P. & D. 683; 38 L. J., P. & M. 65). See also *In the goods of Hubbard*, L. R., 1 P. & D. 53; 35 L. J., P. & M. 27.

(*d*) See *post*, pp. 59—82. See also *Nicholls v. Nicholls*, 2 Phill. 180; *Lister v. Smith*, 3 S. & T. 282; 33 L. J., P. & M. 29; 9 L. T. 578; 10 Jur., N. S. 107; 12 W. R. 319; *Griffin v. Ferrard*, 1 Curt. 97.

(*e*) *Coventry v. Williams*, 3 Curt.

Express declaration by
testator.

But nothing can override an express declaration by a testator; therefore in a recent case, where a paper was headed with these words, "this is not meant as a legal will, but as a guide," the Court refused to admit it to probate, although it fulfilled all the conditions necessary to make it a valid testamentary paper, and, with the exception of the above words, clearly appeared to be so on the face of it (*f*).

Where something appears on the face of an instrument to suggest a doubt as to whether it is intended to be testamentary or not, then extrinsic evidence is admissible as to the circumstances of its execution, for the purpose of showing its true character. But the burden of proof is not thereby thrown on the person propounding the instrument (*g*).

Contingent
will.

A will may be made contingent on the happening of a certain event (*h*), or on the assent of a third party (*i*); but such a will can only be admitted to probate in the event of the contingency happening on which it is dependent.

It is often, however, a question whether the disposition of the property bequeathed by it is dependent upon the happening of some event or calamity referred to in the will, or whether the imminence of such event, or calamity, is merely a reason for making the will: in the former case the will is contingent, in the latter, it is not (*k*).

791; *Thorncroft v. Lashmar*, 2 S. & T. 479; 31 L. J., P. & M. 150; 6 L. T. 476; 8 Jur., N. S. 595; 10 W. R. 783.

(*f*) *Ferguson Davie v. Ferguson Davie*, 15 P. D. 109; 59 L. J., P. D. & A. 70; 62 L. T. 703.

(*g*) *Whyte v. Pollok*, 7 App. Cas. 400; 47 L. T. 356; 47 J. P. 340.

(*h*) *In the goods of Porter*, L. R., 2 P. & D. 22; 39 L. J., P. & M. 12.

(*i*) *In the goods of Smith*, L. R., 1 P. & D. 717; 38 L. J., P. & M. 85; 21 L. T. 340; 17 W. R. 1110. See also *Parsons v. Lawe*, 1 Ves. sen. 190.

(*k*) *In the goods of Porter*, L. R., 2 P. & D. 22; 39 L. J., P. & M. 12. See also *Repington v. Holland*, 2 Cas. temp. Lee, 106; *Burton v. Collingwood*, 4 Hagg. 176; *In the goods of Parker*, 2 S. & T. 375; 28 L. J., P. & M. 91; 5 Jur., N. S. 553; *Southall v. Jones*, 1 S. & T. 298; 28 L. J., P. & M. 112; 5 Jur., N. S. 369; 7 W. R. 381; *Roberts v. Roberts*, 2 S. & T. 337; 31 L. J., P. & M. 46; *In the goods of Cawthron*, 3 S. & T. 417; 33 L. J., P. & M. 23; 10 Jur., N. S. 51; 12 W. R. 443; *In the goods of Thorne*, 4 S. & T. 36; 34 L. J., P. & M.

So where a testator, being about to travel, made his will containing the following words, "On leaving this station for T. and M., in case of my death on the way, know all men this is a memorandum of my last will and testament," the Court held that the will was not contingent (*l*).

It is said (*m*), "that there cannot be a conjoint or mutual will; an instrument of such a nature is unknown to the testamentary law of this country" (*n*). But there are several authorities which appear to show that this doctrine does not go further than to deny that a conjoint or mutual will can be made with the characteristic quality of being irrevocable, unless with the concurrence of the joint or mutual testators. Such a will is certainly revocable (*o*). But if either of the testators die without revoking it, the will is valid as far as respects his property (*p*). Where, however, two testators made a joint will containing devises and legacies to take effect after the decease of both of them, it was held that probate could not be granted of the will during the lifetime of either (*q*).

Conjoint or mutual wills.

131; 12 L. T. 639; 11 Jur., N. S. 569; *In the goods of Dobson*, L. R., 1 P. & D. 88; 35 L. J., P. & M. 54; *In the goods of Martin*, L. R., 1 P. & D. 380; 36 L. J., P. & M. 116; 17 L. T. 32; *In the goods of Robinson*, L. R., 2 P. & D. 171; 40 L. J., P. & M. 16; *Lindsay v. Lindsay*, L. R., 2 P. & D. 459; *Jobson v. Ross*, 42 L. J., P. & M. 58.

(*l*) *In the goods of Mayd*, 6 P. D. 17; 50 L. J., P. D. & A. 7; 29 W. R. 214; 45 J. P. 8.

(*m*) Wms. on Exors. 9th ed. p. 8.

(*n*) 1 Cowp. 268, in Lord Mansfield's judgment; *Hobson v. Blackburn*, 1 Add. 277.

(*o*) As to effect of such wills in Equity, see Wms. on Exors. 9th ed. pp. 107—109.

(*p*) *In the goods of Stracey*, Dea. & Sw. 6; *In the goods of Lovegrove*, 2 S. & T. 453; 31 L. J., P. & M. 87; 6 L. T. 131; 8 Jur., N. S. 442.

(*q*) *In the goods of Raine*, 1 S. & T. 144.

CHAPTER III.

OF THE KNOWLEDGE AND APPROVAL BY THE TESTATOR OF
THE CONTENTS OF A TESTAMENTARY INSTRUMENT.

THIS subject belongs properly neither to the preceding nor to the following chapter. I have, therefore, thought it best to treat of it apart.

Testator must
know and ap-
prove of con-
tents of will.

It is now established (*a*) that even in the case of a person in every sense capable of making a will, it is essential to the validity of the document that the testator, at the time of its execution, should know and approve of its contents (*b*); and the burden of proving that the testator knew and approved of the contents of his will lies on the party propounding it (*c*).

But if it be proved or admitted that a testator is of sound disposing mind, and that a testamentary document has been read over to him, or that he has read it to himself, and has put his signature to it, he must be taken to have known and approved of every part of it (*d*).

Presumption

But this presumption of the testator's knowledge ex-

(*a*) It was once thought that a testator could delegate his power of making a will to another, so as to dispense with knowledge of contents. *Per* Sir C. Cresswell, *Middlehurst v. Johnson*, 38 L. J., P. & M. 14. See also *Cunliffe v. Cross*, 3 S. & T. 37; 32 L. J., P. & M. 68; 9 Jur., N. S. 210; 8 L. T. 172; 11 W. R. 258.

(*b*) *Hastilow v. Stobie*, L. R., 1 P. & D. 64; 35 L. J., P. & M. 18;

13 L. T. 473; 11 Jur., N. S. 1039; 14 W. R. 211.

(*c*) *Cleare v. Cleare*, L. R., 1 P. & D. 655; 38 L. J., P. & M. 81; 28 L. T. 497; 17 W. R. 687.

(*d*) *Atter v. Atkinson*, L. R., 1 P. & D. 665; 20 L. T. 404. See also *Gardhouse v. Blackburn*, L. R., 1 P. & D. 109; 35 L. J., P. & M. 116; 14 L. T. 69; 12 Jur., N. S. 278; 14 W. R. 463.

tending to every part of the will may be rebutted where the proof that the will was read over to the testator is open to suspicion, or where there is room for a suggestion of fraud, especially in cases where the will has been suggested and propounded by strangers in blood to the testator, but who are beneficiaries under it (*e*).

of knowledge and approval may be rebutted.

The knowledge of a third person may be equivalent to the knowledge of the testator; so, where a testatrix sent to her solicitor telling him to prepare her will, and adding that he knew her wishes, it was held that there was evidence that the testatrix knew and approved of its contents, although it was not read over to her before she executed it (*f*); but if it be shown that a testator executed one document by mistake for another, no presumption of knowledge and approval of contents can arise, however similar the contents of the two documents may have been (*g*).

Knowledge of contents.

In *Parker v. Felgate* (*h*), the testatrix had given careful

(*e*) *Fulton v. Andrew*, L. R., 7 H. L. 448; 44 L. J., P. D. & A. 17; 32 L. T. 209; 23 W. R. 566. See also *Philips v. Longbourne*, not reported, cited in *Tristram on Probate*, 439.

(*f*) *Goodacre v. Smith*, L. R., 1 P. & D. 359; 36 L. J., P. & M. 43; 15 L. T. 511; 15 W. R. 561.

(*g*) *In the goods of Hunt*, L. R., 3 P. & D. 250; 44 L. J., P. & M. 43; 33 L. T. 321; 23 W. R. 553; Anonymous case referred to, 14 Jur. at p. 402; *In the goods of Clark*, 2 Curt. 329. See also on the subject of knowledge of contents generally, *Lonchamp v. Goodfellow*, 2 Bos. & P., N. R. 145; *Billingham v. Vicars*, 1 Phill. 187; *Mitchell v. Thomas*, 5 No. of Cas. Ecc. 612; *Butlin v. Barry*, 1 Curt. 614; 6 Moore, P. C. 480; *Paske v. Ollatt*, 2 Phill. 323;

Ingram v. Wyatt, 1 Hagg. 384; 3 Hagg. 466; *Baker v. Batt*, 2 Moo. P. C. 317; *Greville v. Tylee*, 7 Moo. P. C. 320; *Sutton v. Sadler*, 3 C. B., N. S. 87; 26 L. J., C. P. 284; 3 Jur., N. S. 1150. See also *Wms. on Exors.* 8th ed. pp. 355, 356, where the following further cases are also cited on the subject of knowledge and approval of contents: *Rodd v. Lewis*, 2 Cas. temp. Lee, 176; *Goose v. Brown*, 1 Curt. 707; *Fawcett v. Jones*, 3 Phill. 476; *Wheeler v. Alderson*, 3 Hagg. 587; *Browning v. Budd*, 6 Moo. P. C. 435. Approbation will have effect of prior instructions. *Forfar v. Heastie*, 2 Cas. temp. Lee, 299; *Durnell v. Corfield*, 1 Robert. 56.

(*h*) 8 P. D. 171; 52 L. J., P. D. & A. 95; 32 W. R. 186; 47 J. P. 808.

Will prepared in accordance with instructions, not read over.

instructions for her will, and her solicitor had prepared the will in strict accordance with such instructions. At the time of its execution she was dying of Bright's disease, and could only be roused to consciousness with difficulty. There was, however, evidence that she was able to answer questions that were put to her respecting the execution, leaving it a question of fact for the jury to decide whether or not she knew what she was doing. The jury, having answered this question in the affirmative, the Court pronounced for the will, holding that there was sufficient knowledge and approval of its contents, the will having been prepared in accordance with her instructions, although at the time of its execution she merely recollected that she had given those instructions, and believed the will to be in accordance with them.

Words introduced into will by mistake, inadvertence or fraud.

Where words have been introduced into a will by mistake, inadvertence, or by fraud, and the will has not been read over to the testator, the Court will, if possible, carry out the testator's wishes by their omission from the probate of the will, or by substituting other words in their place. So in the case of *Morell v. Morell* (*i*), it was shown that the testator intended the whole of certain shares, described as his B. shares, to go to his nephews, but that the word "forty" had been frequently introduced into the will without his knowledge and approval, and that the clauses containing the word "forty" had not been read over to him. The Court therefore ordered the word "forty" to be struck out of the probate wherever it occurred in the will. So in *In the goods of Bushell* (*k*), the Court substituted the name of one hospital for another; and in *In the goods of Huddleston* (*l*), the word "including" was substituted for "excluding."

And in the very recent case of *In the goods of Boëhm* (*m*),

(*i*) 7 P. D. 68; 51 L. J., P. D. 528; 51 J. P. 806.

& A. 93; 46 L. T. 919; 30 W. R. (*l*) 63 L. T. 255.

691; 46 J. P. 472.

(*m*) (1891) P. 247; 60 L. J.,

(*k*) 13 P. D. 7; 57 L. J., P. D. & A. 80; 64 L. T. 806; 39
& A. 16; 58 L. T. 58; 36 W. R. W. R. 576.

the testator had two daughters, "Georgiana" and "Florence," and it was clear that he had intended to bequeath 10,000*l.* to each of them. But the conveyancer who prepared the will inadvertently inserted the name of "Georgiana" in both clauses relating to the bequests of 10,000*l.*, and omitted that of "Florence" altogether, with the result that, as the will stood, 20,000*l.* were bequeathed to "Georgiana," and nothing at all to "Florence." The Court being satisfied on affidavit that the draft of the will was not read over to the testator at any time, allowed the name of "Georgiana" to be omitted from the probate in the second clause of the gift.

Words introduced into will by mistake, inadvertence or fraud.

Where a portion of a will has been introduced by fraud or perhaps inadvertence, it may be rejected, and probate granted of the remainder if the two are severable. But where the rejection of part alters the sense of the remainder, it is a question whether there is a valid will within the meaning of sect. 9 of the Wills Act (1 Vict. c. 26) (*n*).

Probate of part of will only granted.

(*n*) *Rhodes v. Rhodes*, 7 App. Cas. 192; 51 L. J., P. C. 53; 46 L. T. 463; 30 W. R. 709.

CHAPTER IV.

WHO MAY MAKE A WILL:—ALIENS—THE SOVEREIGN —
PERSONS INCOMPETENT FOR WANT OF SUFFICIENT
LEGAL DISCRETION.

General
principles.

“IT may be laid down generally that all persons are capable of disposing of their personal estate by testament who have sufficient discretion, their own free will, and who have not been guilty of certain offences. Wherefore there are three grounds of incapacity—(1) the want of sufficient legal discretion; (2) the want of liberty or free will; (3) the criminal conduct of the party” (*a*).

There are, however, two classes which do not properly come under either of these heads, viz., “*aliens*,” and the sovereign of these realms (*b*).

Aliens.

Formerly no alien could hold real estate in this country, therefore the question of its disposition by will did not arise. With respect to personal property, there was a distinction between alien friends and enemies; the former being capable of disposing of their personal estate by will, whilst the latter required the King’s licence to enable them to do so.

Now, by sect. 2 of the Naturalization Act, 1870, “real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject.”

But it has been held that a will of a foreigner executed

(*a*) Wms. on Exors. 9th ed. p. 9.

(*b*) *Ibid.* pp. 9—12.

abroad according to the formalities required by English law, but not according to those required by his own country, is invalid, notwithstanding the provisions of this section (c).

Will of
foreigner not
executed in
accordance
with the law
of his own
country.

In this case the deceased was by birth an Englishwoman, and in the course of his judgment the president (Sir James Hannen) observed (d): "It was contended that although this lady was an alien, she had the same right that a natural-born British subject would have had, namely, to make a will according to the forms in force in that part of her Majesty's dominions where she had her domicile of origin. But such an interpretation must, I think, be rejected, unless it were made quite plain that the English legislature intended, with reference to personal property, that an alien should be able to make a will, in a form which is not in conformity with the law of his own country. Of course, an English Court might be compelled by plain language to give such a construction to an enactment, but it is not to be presumed that anything, which is so contrary to the comity of nations, has been intended by the English legislature, and therefore I reject that as not being the meaning of the section.

*In the goods of
Von Buseck,
judgment of
Hannen, P.*

"On the other hand, there is a very plain and intelligible meaning to be given to this Act, viz., that while it gives to aliens the same power to take, acquire, hold, and dispose of all real and personal property, in the same manner in all respects as natural-born British subjects, it does not deal with the question of what is to be the form of the will, which must depend upon other considerations. It leaves to be determined in each particular case what is the form in which, according to the law of the alien's country, the testamentary disposition shall be carried out, and it gives an alien power to dispose in England of personalty by will, subject to the laws of his

(c) *In the goods of Von Buseck*, 9; 30 W. R. 140; 46 J. P. 104.
9 P. D. 211; 51 L. J., P. D. & A. (d) 9 P. D. 212.

own country as to the form in which he shall make that will. This appears to me to be the plain and intelligible construction to be put upon this section, and I must therefore reject the application."

In the subsequent case of *Bloxam v. Favre* (e), in which another attempt was made to obtain probate of the same will of the same lady, the point was carried up to the Court of Appeal, where the views of Sir James Hannen were adopted and confirmed.

The King or
Queen.

With respect to the power of the reigning sovereign to make a will of his or her personal property, it would appear that the power to do so is created by two statutes, the one passed in the sixteenth year of Richard the Second, and the other 39 & 40 Geo. 3, c. 88 (f). It would further appear that the Probate Division has no jurisdiction to grant probate of the will of a deceased sovereign (g).

Persons in-
capable from
want of
discretion.

Under the head of persons incapable for want of sufficient legal discretion, are included, infants, idiots, deaf and dumb, blind, persons who cannot read, lunatics, persons who from old age or other causes have out-lived their understanding, and persons drunk (h).

Infant.

By sect. 7 of the Wills Act (1 Vict. c. 26) it is enacted, "that no will made by any person under the age of twenty-one years shall be valid."

Idiot.

An idiot is defined to be "a fool or madman from his nativity, who never had any lucid intervals, who cannot count twenty, does not know his parents, his own age, &c." Such a one is incapable of making a will; and however reasonable his will may appear to be, it is void in law.

(e) 9 P. D. 130; 53 L. J., P. & M. 26; 50 L. T. 766; 32 W. R. 673.

(f) For the provisions of these statutes, and on this subject generally, see Wms. on Exors. 9th ed. pp. 10—12.

(g) See *In the goods of Geo. III.* 1 Add. 255; *Ibid.* (after the creation of the Probate Court), 3 S. & T. 199; 32 L. J., P. & M. 15; 3 Jur., N. S. 1134; 11 W. R. 190.

(h) See Wms. on Exors. 9th ed. pp. 12—36.

But whether a man be an idiot or not is, of course, a question of fact, to be determined by evidence (*k*).

“One who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making a will; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means, and has a desire to make one, then he may by signs and tokens declare his testament. One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then, in case he shall be able to write, he may with his own hand write his last will and testament. But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, *i.e.*, if he have understanding, he may make his testament by signs, otherwise not at all. Such as can speak and cannot hear, they may make their testaments, as if they could both speak and hear, whether that defect came by nature or otherwise. Such as be speechless only, and not void of hearing, if they can write, may very well make their testaments themselves by writing: if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as be then present” (*l*).

Deaf and dumb.

A blind person may make his or her will, but before such a will is admitted to probate there must be satisfactory proof that the will was read over to the testator before execution, and that, at the time of its execution, he knew and approved of its contents (*m*).

Blind persons.

And the same precautions would appear to be necessary in the case of persons who cannot read (*n*).

Persons who cannot read.

Lunacy differs materially from idiotcy (*o*). A lunatic is defined to be “a person usually mad, but having

Lunatic.

(*k*) See Wms. on Exors. 9th ed. p. 12.

(*m*) *Ibid.* pp. 13, 14.

(*n*) *Ibid.* p. 14.

(*l*) *Ibid.* pp. 12, 13.

(*o*) See *Ibid.* pp. 14—36.

intervals of reason, who, during the time of his insanity, cannot make a testament, nor dispose of anything by will" (*p*).

Presumption
of sanity.

Sanity must be presumed until the contrary is shown. If, therefore, a will, rational on the face of it, be produced, and its due execution proved, the Court must find in its favour; for the burden of proof is *prima facie* on the person seeking to invalidate what, on the face of it, purports to be a legal act. But this presumption of sanity is, at most, a mixed question of law and fact; therefore, if the party opposing the will produce evidence of the testator's insanity, the burden of proof is shifted, and it lies on the party setting up the will to show that it was the last act of a capable testator (*q*).

Evidence of
insanity.

Insanity, to upset a will rational on the face of it, must be proved by the clearest possible evidence, and the Court should rely but little on the mere opinion of witnesses, but look to the grounds of such opinions (*r*). The opinions of medical men as experts, whether founded on personal knowledge or observation, or on the case as proved at the trial, are admissible in evidence (*s*). But the treatment of an alleged lunatic by his relatives and friends is not admissible evidence on the question of his sanity (*t*).

Opinions of
medical men.

"The presumption of law is, that a verdict of a jury

(*p*) *Ibid.* p. 14.

(*q*) *Ibid.* pp. 15, 16; see also *Smee v. Smee*, 5 P. D. 84; 49 L. J., P. D. & A. 8; *Sutton v. Sadler*, 3 C. B. (N. S.) 87; 26 L. J., C. P. 84; 3 Jur., N. S. 1150; *Symes v. Green*, 1 S. & T. 401; 28 L. J., P. & M. 83.

(*r*) *Per* Sir John Nicholl, *Kindleside v. Harrison*, 2 Phill. 459. See also expressions to the same effect, *Evans v. Knight*, 1 Add. 239; *Wood v. Wood*, 1 Phill. 363; *Wheeler v. Alderson*, 3 Hagg. 605, by Tindal, C. J.; *Tatham v. Wright*, 2

Russ. & M. 22; and by Lord Langdale, *Steed v. Calley*, 1 Keen, 620.

(*s*) Taylor on Evidence, 6th ed. p. 1229, § 1278. See also *Rex v. Wright*, R. & R. 456; *Martin v. Johnston*, 1 F. & F. 122.

(*t*) *Doe d. Tatham v. Wright*, 7 A. & E. 315. "In this case it was decided by the House of Lords that letters written to the testator, and not acted upon, or indorsed, or answered by him, are not evidence of his sanity." Wms. on Exors. 9th ed. p. 36.

under a commission of lunacy that the party, the subject of the commission, is of unsound mind, is well founded, and if the commission remained unsuperseded, that the party continued a lunatic until his death. Such presumption, however, may be rebutted and displaced by positive proof of entire recovery or possession of a lucid interval when a testamentary instrument was executed" (u). Commission of lunacy.

"If a lunatic have clear or calm intermission (usually called lucid intervals), then during the time of such quietness and freedom of mind, he may make his testament, appointing executors and disposing of his goods at pleasure" (x). Will made during a lucid interval.

But in order to establish the validity of a will made during a *lucid interval*, the Court must be satisfied that such lucid interval was a substantial, though a temporary, recovery. A mere cessation of the violent symptoms is not enough; there must be restoration of the mind sufficient to enable the party soundly to judge of the act; and the Court should examine whether the will was framed by the party himself without assistance, and be satisfied that the lucid interval was of sufficient duration for the performance of the act; and in all cases where the will of a testator afflicted with habitual insanity, with intermissions, is under consideration, the contents of the instrument itself affords valuable, though not conclusive, evidence as to his state of mind when he made it (y). Lucid interval.

(u) Wms. on Exors. 9th ed. p. 32.

(x) *Ibid.* p. 16.

(y) See *Ibid.* pp. 16—23; also the following cases:—*Cartwright v. Cartwright*, 1 Phill. 100; *Att.-Gen. v. Parnter*, 3 Bro. C. C. 443; *Hall v. Warren*, 9 Ves. 611; *Kemble v. Church*, 3 Hagg. 273; *White v. Driver*, 1 Phill. 88; *Brogden v. Brown*, 2 Add. 445; *Ayrey v. Hill*, 2 Add. 210; *Kindleside v. Harrison*, 2 Phill. 459; *Chambers v.*

Queen's Proctor, 415, 451; *Bannatyne v. Bannatyne*, 2 Robert. 472, 501; *Nicholls v. Binns*, 1 S. & T. 239; *Seruby v. Fordham*, 1 Add. 90; *McAdam v. Walker*, 1 Dow, 178; *Clarke v. Lear*, cited 1 Phil. 119; *Coghlan v. Coghlan*, *ib.* 120; *Evans v. Knight*, 1 Add. 237, 238; *Williams v. Goude*, 1 Hagg. 577; *Borlase v. Borlase*, 4 N. of C. 106; *Waring v. Waring*, 4 Moo. P. C. 351; *Dimes v. Dimes*, 10 *ib.* 422; and see further the following autho-

Partial insanity.

Partial insanity has been defined by Lord Brougham as "insanity, or unsoundness, always existing, although only occasionally manifest" (z).

The most common form of "*partial insanity*" is where the patient, though perfectly sane on general subjects, is nevertheless the victim of "*delusions*" on certain points.

Delusions.

For a man may be capable of transacting business of an important kind, involving the exercise of considerable powers of intellect, and yet may be subject to delusions so as to be unfit to make a will.

Monomania.

This form of disease is commonly known by the name of *monomania*—a word not strictly applicable, as persons in this condition are often subject to delusions on more than one particular subject; but the now established principle of law is, that, if the delusions under which a testator labours are such that they could not reasonably have been supposed to have affected the disposition made by his will, the will is valid; and as the burden of proving capacity rests in all cases upon those who propound a testamentary

rities on the subject of testamentary capacity generally:—*Beverley's case*, 4 Co. 124 b; *Frere v. Peacocke*, 3 Curt. 664; *Groom v. Thomas*, 2 Hagg. 434; *Hoby v. Hobv*, 1 Hagg. 146; *Grimani v. Draper*, 6 N. of C. 418; *Fowlis v. Davidson*, *ibid.* 461; *Holyland, Ex parte*, 11 Ves. 10; and Haggard's Report of Judgment; *Greenwood's case*, 3 Curt., App. I.—p. xxxi., cited by L. Brougham, trial of Hadfield; by Sir John Nicholl, 3 Add. 96, 97; by Lord Eldon in *White v. Wilson*, 13 Ves. 87; *Fulleck v. Allinson*, 3 Hagg. 527; *Mudway v. Croft*, 3 Curt. 671; *Austen v. Graham*, 8 Moo. P. C. 493; *Arbery v. Ashe*, 1 Hagg. 214; *Le Breton v. Fletcher*, 2 Hagg. 558; *Lowe v. Jolliffe*, 1

W. Bl. 365; *Wrench v. Murray*, 3 Curt. 623; *Montefiore v. Montefiore*, 2 Add. 361, 362; *Young v. Dendy*, L. R., 1 P. & D. 344; *Smith v. Tebbitt*, L. R., 1 P. & D. 398; 36 L. J., P. & M. 97; 16 L. T. 841; 16 W. R. 18; *Banks v. Goodfellow*, L. R., 5 Q. B. 549; *Boughton v. Knight*, L. R., 3 P. & D. 64; 42 L. J., P. & M. 25; 28 L. T. 562; *Smee v. Smee and Corporation of Brighton*, L. R., 5 P. D. 84; 49 L. J., P. & M. 8. See also Wms. on Exors. 8th ed. pp. 19—38.

(z) 6 Moo. P. C. 350. See on this subject Wms. on Exors. 9th ed. pp. 23—31. It would seem that this subject was first fully investigated in *Dew v. Clark*, 1 Add. 279; 3 Add. 79.

paper, it is more especially so when it appears that the testator was subject to delusions (a).

A fair example of a will intimately connected with a delusion to which a testator was subject, is to be found in the most recent case upon the point, *Smee v. Smee and the Corporation of Brighton* (b), where the testator, a man of a capacity perhaps above the average in the ordinary affairs of life, laboured under the delusion that he was the son of his late Majesty George IV., and left a considerable amount of property to the Corporation of Brighton towards founding a public library in the Royal Pavilion, in which he could have had no especial interest, except that it was built by his imagined father, and was his favourite marine residence.

But the whole question of unsoundness of mind was most fully treated of some years ago by the late Lord Chief Justice Cockburn, in delivering the unanimous decision of the Court of Queen's Bench in *Banks v. Goodfellow* (c). In that judgment some of the principal English and American cases and Continental authorities on insanity are passed in review; and Lord Hannen has well said of it, "that it would well repay the trouble of reading it, to laymen as well as professional men" (d).

The following is from the judgment of Lord Hannen in *Boughton v. Knight* (e):—"Now I would call your attention to a case which has been frequently adverted to during the course of this trial—the case of *Banks v. Goodfellow* (f)—which was decided in the Court of Queen's Bench, when I had the honour of being a member of it. I was a party to the judgment, but the language of it was that of the present Lord Chief Justice. As a party to it

(a) *Smee v. Smee and Corporation of Brighton*, L. R., 5 P. D. 84; 49 L. J., P. & M. 8. *fett v. Smith*, 12 P. D. 116; 57 L. T. 498; 51 J. P. 374.

(d) L. R., 3 P. & D. at p. 74.

(e) L. R., 3 P. & D. 64; 42 L. J., P. & M. 25; 28 L. T. 562.

(f) L. R., 5 Q. B. 549.

(b) *Ibid.*

(c) L. R., 5 Q. B. 549; followed by the Divisional Court (Lord Coleridge, C. J., and Butt, J.) in *Mur-*

*Boughton v.
Knight;
Banks v.
Goodfellow.*

I am bound by it in the sense in which I understand its words. There can be little room for misconception as to its meaning, but I will explain to you the scope and bearing of it. It was a case in which a man who had been subject, before and after making his will, to delusions, was not shown to be either under the influence of those delusions at the time, or, on the other hand, to be so free from them that if he had been asked questions about them he would not have manifested that they existed in his mind. But he made a will by which he left his property to his niece, who had lived with him for many years, and to whom he had always expressed an intention to leave his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property, and of whom it was right he should take care on his death. It was left to the jury to say whether he made that will uninfluenced by the delusions he was shown to have had before and after, and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered; and it was held that, under those circumstances, the jury finding the fact in that way, such finding could not be set aside.

“I will not trouble you by reading the whole judgment, which, however, would well repay the trouble of reading it, by laymen as well as by professional men; but I will pick out passages to show you how carefully guarded against misapprehension the decision is. . . . In one passage the Lord Chief Justice says: ‘No doubt when the fact that a testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should, in the first instance, be made against it. Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in

the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded' (g).

*Boughton v.
Knight;
Banks v.
Goodfellow.*

“In an earlier passage the Lord Chief Justice lays down with, I think I may say, singular accuracy what is essential to the constitution of testamentary capacity. ‘It is essential to the exercise of such a power’ (of making a will) ‘that a testator shall understand the nature of the act and its effects—shall understand the extent of the property of which he is disposing—shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections or the moral sense become perverted by mental disease—if insane suspicion or aversion take the place of natural affection—if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand.’ Gentlemen, I have

(g) “By the Roman law testaments might be set aside as being *inofficiosa*, deficient in natural duty, if they totally passed by (without assigning a true and sufficient reason) any of the children of the

testator, though if the child had any legacy, however small, it was a proof the testator had not lost his memory or reason, which otherwise the law presumed.” Wms. on Exors. 9th ed. p. 32.

no fear, when rightly understood, of that case being misapplied."

*Burdett v.
Thompson.*

A few weeks later the same learned judge, in summing up the case of *Burdett v. Thompson* (*h*), said, "The question of unsoundness of mind is one of degree, and it is impossible to lay down any abstract proposition of law which will guide you in determining it. Probably the mind of no person can be said to be perfectly sound. The question is, whether there was such a degree of unsoundness of mind as to interfere with those faculties which ought to be brought into action in making a will. I have been misunderstood by some persons who have commented on what I said on this subject in a recent case, and who appear not to have been sufficiently careful in examining the accurate meaning of the language used by me. It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a will. That is very different from the proposition that it requires a higher degree of soundness of mind to make a will than do anything else. From the character of the act it requires the consideration of a larger variety of circumstances than is required in most other acts, for it involves reflection upon the claims of several persons who by nature or through other circumstances may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will."

(*h*) Cited in note to *Boughton v. Knight*, L. R., 3 P. & D. at p. 72.

Persons who from old age have outlived their understandings, and those who have become temporarily incapable by their own act, as drunkards and the like, may be incapable of making a valid testament (*i*). “For a man may perhaps not be insane, and yet not equal to the important act of disposing of his property by will” (*k*).

Aged persons, drunkards, &c.

Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the Court (*l*).

Old age.

“Intoxication is, in truth, temporary insanity” (*m*), but as the disease in such a case is in itself of a temporary nature, the presumption of its continuance does not apply.

Insanity, temporary, as drunkenness and the like.

So, where a testator was proved to have been not properly a madman, but an habitual drunkard, who, under the excitement of liquor, acted in all respects very like a madman; on it being shown that at the time of making the will the testator was not under the influence of liquor, the will was supported (*n*).

Where the mental capacity of a testator is doubtful at the time of the execution of a testamentary document, “there must be clear proof of instructions and reading over” (*o*); and it is always a most dangerous proceeding

Capacity doubtful.

(*i*) See Wms. on Exors. 9th ed. pp. 32—35.

(*k*) *Mountain v. Bennett*, 1 Cox, 356.

(*l*) *Kindleside v. Harrison*, 2 Phill. 449. See further on this point, *Ex parte Cranmer*, *Sherwood v. Sander-son*, 19 Ves. 283; *Ridgway v. Darwin*, 8 Ves. 66; *Bird v. Bird*, 2 Hagg. 142; *Lewis v. Pead*, 1 Ves. jun. 19; *Prinsep v. Dyce Sombre*, ante; *Banks v. Goodfellow*, ante; *Combes' case*, Moo. 769; *Marquis of Winchester's case*, Coke, 23, a; *Herbert v. Lowns*, 1 Ch. R. 24; *Ball v. Mannin*, 1 Bligh, N. S. 1; *Marsh v. Tyrrell*, 2 Hagg. 122; *Constable v. Tufnell*, 4 Hagg. 465; affirmed on appeal, 3 Knapp, 122; *Harwood v. Baker*, 3 Moo. P. C. 282; *Sefton v.*

Hopwood, 1 F. & F. 578; *Swinfen v. Swinfen*, *ibid.* 584; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Harrod v. Harrod*, 1 Kay & J. 4.

(*m*) *Per* Sir John Nicholl, *Wheeler v. Alderson*, 3 Hagg. 602.

(*n*) *Ayrey v. Hill*, 2 Add. 206—210. See also Wms. on Exors. 9th ed. p. 35.

(*o*) *Per* Sir John Nicholl, *Billinghurst v. Vickers*, 1 Phill. 193. See also *Durnell v. Corfield*, 3 No. of Cas. Ecc. 233; *Michell v. Thomas*, 5 No. of Cas. Ecc. 610. For a case where the capacity was doubtful at the time of the execution of the will, see *Parker v. Felgate*, 8 P. D. 171; 52 L. J., P. D. & A. 95; 32 W. R. 186; 47 J. P. 808.

Instructions
from party
interested.

for a solicitor to take instructions from one of the parties interested without any communication with the testator himself (*p*).

“If a will be executed by a testator of sound mind at the time of execution, and be afterwards wholly or partially defaced by him, while of unsound mind, such will is to be pronounced for as it existed in the integral state, that being ascertainable” (*q*).

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| <p>(<i>p</i>) <i>Wallis v. Maughan</i>, 1 No. of
Cas. Ecc. 534.</p> <p>(<i>q</i>) See Wms. on Exors. 9th ed.
p. 36; see also <i>Scruby v. Fordham</i>,</p> | <p>1 Add. 74; <i>In the goods of Brand</i>,
3 Hagg. 754; <i>Harris v. Berrall</i>, 1
S. & T. 153.</p> |
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CHAPTER V.

WHO MAY MAKE A WILL—PERSONS INCAPABLE FROM WANT
OF LIBERTY OR FREE WILL — PRISONERS — WILL
OBTAINED BY FORCE—FRAUD—IMPORTUNITY—UNDUE
INFLUENCE.

“ SUCH persons as are intestable for want of liberty or free Prisoners.
will are by the civil law of various kinds, as prisoners,
captives, and the like. But the law of England does not
make such persons absolutely intestable, but only leaves it
to the discretion of the Court to judge upon the considera-
tion of their particular circumstances of duress, whether
or no such persons could be supposed to have *liberum*
animum testandi” (a).

“ If it should be demonstrated that actual force was Actual force,
used to compel the party to make the will, there can be will obtained
no doubt that, although all the formalities required had by.
been complied with, such a will could never stand ” (b).

If the testament be made under the influence of fear it Fear, will
will be void. But it must be such a fear as might reasonably made under
be supposed to affect an ordinarily reasonable man, such influence of.
“ as the fear of death, or of bodily hurt, or of imprison-
ment, or of loss of all or most part of one’s goods, or the
like: whereof no certain rule can be delivered, but it is
left to the discretion of the judge, who ought not only to
consider the quality of the threatenings, but also the per-
sons, as well threatening as threatened; in the person

(a) Wms. on Exors. 9th ed.
pp. 36, 37.

(b) *Ibid.* p. 37; see also *Mountain*
v. Bennett, 1 Cox, Ch. Cas. 355, per
Eyre, C. B.

threatened the sex, age, courage, pusillanimity, or the like" (c).

Fraud, will
obtained by.

"Fraud is no less detestable in law than open force. Therefore, if a testator be circumvented by fraud, the testament is of no more force than if it were made under the influence of fear" (d).

What amount of deceit will amount to fraud is left to the discretion of the judge. "If part of a will has been obtained by fraud, probate, it should seem, ought to be refused as to that part and granted as to the rest" (e).

Fraud must be specially pleaded, and cannot be raised under a plea of undue influence (f). False and fraudulent representations to an aged, infirm testator respecting the characters of individuals, made with a view to prejudice him against them and induce him to revoke bequests made in their favour, afford strong reasons for setting a will aside on the ground of fraud (g). And where there is no evidence of instructions by the deceased, and a will has been entirely prepared by a solicitor who takes almost the entire property, there is strong ground to suspect fraud and imposition (h).

Will made
through bene-
ficiary, &c.

In the case of *Parker v. Duncan* (i) Lord Hannen directed the jury that it was the duty of any person, who expects that a will is about to be made in his favour, to see that the testator receives proper and independent advice; and he should take care that the testimony called in support of the will should not be that of himself alone, but

(c) Wms. on Exors. 9th ed. p. 37. See also *Nelson v. Oldfield*, 2 Vern. 76.

(d) *Ibid.* pp. 37, 38. Fraud and imposition upon weakness is a sufficient ground to set aside a will of real, much more of personal estate, though such weakness is not sufficient to ground a commission of lunacy (per Lord Hardwicke, in *Lord Donegal's case*, 2 Ves. sen. 408); *ibid.* p. 37, n. (m).

(e) *Ibid.* p. 38. See also *Allen v. McPherson*, 1 H. of L. 191; *Trimlestown v. D'Alton*, 1 Dow, N. S. 85.

(f) *White v. White*, 2 S. & T. 504; 31 L. J., P. & M. 215.

(g) *Allen v. McPherson*, 1 H. of L. Ca. 207; *Butterfield v. Scarwen*, cited *ibid.* at p. 208.

(h) *Ingram v. Wyatt*, 1 Hagg. 384; *Middleton v. Forbes*, cited per Sir W. Wynne, *ibid.* 398.

(i) 62 L. T. 642; 54 J. P. 280.

that it should be independent and impartial. The mind of the testator should be left perfectly free and untrammelled. The fact that a person propounding a will under which he benefits largely is the person who alone took the instructions for it, and either prepared or procured its preparation, is a circumstance of grave suspicion, and calls for special care and vigilance on the part of the Court and jury in examining the evidence adduced in support of it; and unless that suspicion is removed, and the Court and jury are judicially satisfied that the terms of the document actually express the true wishes of the testator, the will ought to be pronounced against. For in every case the party propounding a will must show it is the act of a "free and capable testator" (*k*).

Will obtained by beneficiary.

And in every case where a will has been procured and is propounded by a beneficiary who takes a large benefit thereunder, the Court should approach its consideration with suspicion, even though fraud be not pleaded, and it is not suggested that either there was any incapacity on the part either of the testator or the witnesses at the time of its execution. So where a beneficiary who propounded a will under these circumstances failed to satisfy the Court, by affirmative and conclusive evidence, that the testator knew and approved of its contents at the time he executed it, the Court pronounced against the will with costs (*l*).

Will propounded by beneficiary.

In the recent case of *Riding v. Hawkins* (*m*), where the burden of proof was on the defendant, and the plaintiff had pleaded undue influence only, Butt, J., after the defendant had been cross-examined and his case was closed, allowed the plaintiff to amend her pleadings by adding a plea that the codicil in dispute had been obtained by the fraudulent misrepresentations of the defendant, the evidence in support of such plea to be confined to matters

Plea of fraud allowed to be added after defendant's cross-examination.

(*k*) *Per* Parke, B., *Barry v. Butlin*, 7 H. L. 448; 44 L. J., P. & M. 17; 32 L. T. 209; 23 W. R. 566.

(*l*) *Brown v. Fisher*, 63 L. T. 465 (*m*) 14 P. D. 56; 58 L. J., P. D. & following *Fulton v. Andrew*, L. R., A. 48; 60 L. T. 869; 37 W. R. 575.

Plea of fraud
added at trial.

arising upon the defendant's cross-examination. Subsequently the Divisional Court held, that the amendment had been properly allowed, though they granted a new trial on the ground of surprise (*n*).

Importunity,
will obtained
by.

If a man (said Rolfe, C. J., at a trial at bar) "makes a will in his sickness by the over-importunity of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will" (*o*). But this importunity must be in such a degree as to destroy free agency, such as the testator is too weak to resist (*p*).

"A will made by interrogatories is valid; but undoubtedly when a will is so made the Court must be more on its guard against importunity" (*q*).

Undue in-
fluence, will
obtained by.

But there is another and most important class of cases, in which not physical but moral force has been made use of by persons about the testator, to induce him to make a testamentary disposition in accordance with their wishes, and these cases are commonly classed under the head of "*Wills obtained by undue influence.*"

"But the influence to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment; it must not

(*n*) "The Court granted a new trial on the ground of surprise, but in regard to the amendment of the pleadings, held that the learned judge was justified in allowing it under the circumstances. The charges made against the defendant, if established, would properly support a plea of fraud, and it was therefore the duty of the judge to allow the plaintiff to amend her pleadings, always taking care that the defendant was exposed to no hardship. This the learned judge did by offering to allow a postponement, if the defendant wished it.

The defendant's counsel had not availed themselves of this offer, but the Court was of opinion that they were not thereby precluded from arguing that their client was taken by surprise by the evidence given at the trial in support of the plea of fraud." 14 P. D. at p. 59.

(*o*) Wms. on Exors. 9th ed. pp. 38, 39, citing *Hacker v. Newborn*, Styles, 427.

(*p*) *Ibid.* p. 39, citing *Kindleside v. Harrison*, 2 Phill. 551.

(*q*) *Ibid.* citing *Green v. Skipworth*, 1 Phill. 58.

be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion—by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear” (r).

Undue influence, will obtained by.

Whether that amount of undue influence which will come within the description above cited has or has not been exercised, is a question entirely of fact, and must depend upon the circumstances of each particular case. It may exist in the form of bad companionship; but in order to set aside a testamentary paper executed by a person of sound mind under its influence, it must be shown that the circumstances under which such testamentary paper was executed are inconsistent with any hypothesis except that of undue influence (s).

A pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment of a testator, will constitute undue influence (t).

A great change of testamentary dispositions long adhered to, especially where the person in whose favour the change is made possesses great influence and authority, and the testator's capacity is doubtful at the time of the change (u), and, generally, bequests made in favour of persons immediately about them, and possessing great

(r) Wms. on Exors. 9th ed. p. 40; see also *Constable v. Tufnell*, 4 Hagg. 477; 3 Knapp, 122; *Dickinson v. Moss*, 4 Burn. 58, Tyrwhitt's ed.; *Williams v. Goude*, 1 Hagg. 581; *Bird v. Bird*, 2 Hagg. 142; *Browning v. Budd*, 6 Moo. P. C. 430; *Sefton v. Hopwood*, 1 F. & F. 578; *Lovett v. Lovett*, *ibid.* 581; *Norton v. Relly*, 2 Eden, 286; *Huquenin v. Basely*, 14 Ves. 273; *Ingram v. Wyatt*, 1 Hagg. 94; *Cock-*

raft v. Rawles, 4 N. of C. 237; *Marsh v. Tyrrell*, 2 Hagg. 84; *Trimlestown v. D'Alton*, 1 Dow, N. S. 85; *Mynn v. Robinson*, 2 Hagg. 179.

(s) *Boyse v. Rossborough*, 6 H. of L. Cas. 2; 3 Jur., N. S. 373.

(t) *Hall v. Hall*, L. R., 1 P. & D. 481; 37 L. J., P. & M. 40; 18 L. T. 152; 16 W. R. 544.

(u) *Marsh v. Tyrrell*, 2 Hagg. 87.

Undue influence, will obtained by.

influence over them, by weak and dying persons (particularly if such bequests are contrary to natural equity, and other members of the family and friends have been kept away from the testators), are circumstances suggestive of undue influence, which should arouse the suspicion of the Court (*x*), but they do not in any way alter the burden of proof which invariably lies on the party alleging undue influence.

As has been already seen, acts, to constitute undue influence, must amount to coercion; therefore, no amount of acts of mere kindness and attention, however calculated to arouse the gratitude of the testator, will amount to undue influence (*y*).

Parfitt v. Lawless.

In a comparatively recent case on the subject of undue influence—*Parfitt v. Lawless* (*z*)—where the testatrix had bequeathed a large portion of her property to the plaintiff—a Roman Catholic priest who resided with her as domestic chaplain, and was also her confessor—an attempt was made to argue that the rules adopted in Courts of Equity in relation to gifts *inter vivos* ought to be applied to the making of wills. But Lord Penzance held, that the presumptions of law in cases of gifts *inter vivos* and wills were directly opposed to each other in this respect, and that whereas in the case of gifts *inter vivos*, whenever an intimate relationship is shown to have existed between the donor and the donee, the burden lies upon the party benefited of showing that the gift was obtained without undue influence, on the other hand, in the case of a testamentary paper, the burden lies on the party who opposes the admission of such testamentary paper to probate to show, by such evidence as a jury could reasonably act upon, that the execution of

(*x*) See *Mynn v. Robinson*, *ibid.* 179; *Harwood v. Baker*, 3 Moo. P. C. 282; *Deare v. Elwyn*, 1 No. of Cas. Ecc. 344; *Cockcraft v. Rawles*, 4 No. of Cas. Ecc. 237.

(*y*) See *Loftus v. Hopwood*, 1 F. & F. 578; *Lovett v. Lovett*, *ibid.* 581.

(*z*) L. R., 2 P. & D. 462; 41 L. J., P. & M. 68; 27 L. T. 215.

such testamentary paper was obtained by undue influence, which, his lordship further says (after citing the passage from Williams on Executors cited above, *ante*, p. 38), must amount to coercion (*a*).

Undue influence, will obtained by.

(*a*) See judgment of Lord Penzance, L. R., 2 P. & D. pp. 468 to 476. The following were cited in argument in support of the will: *Boyse v. Rossborough*, 6 H. L. C. at p. 2; *Standen v. Edwards*, 1 Ves. jun. 133; *Mountain v. Bennett*, 1 Cox, Eq. C. 353; *Norton v. Reilly*, 2 Eden, 286; *Dent v. Bennett*, 4 My. & Cr. 269; *Huguenin v. Basely*, 14 Ves. 273; *Williams v. Goude*, 1 Hagg. 577; *Barry v. Butlin*, 2 Moo. P. C. 480; *Jones v. Godrich*, 5 Moo. P. C. 16; *Kelly v. Thewles*, 2 Ir. Ch. 510; *Re Metcalfe's Will*, 2 D., J. & S. 122; 33 L. J., Ch. 308; *Wanney v. Williams*, 22 Beav. 452; *Waters v. Thorne*, *ibid.* 547; *Ireland v. Rendall*, L. R., 1 P. & D. 194; *Cleare v. Cleare*, *ibid.* 655; *Alter v. Atkinson*, *ibid.* 665; *Harrington v. Bowyer*, L. R., 2 P. & D. 264; and in support of the contention that wills and gifts *inter vivos* stand on the same footing, 2 Burge, Conflict of Laws, 487; *Hunter v. Atkins*, 3 My. & K. 113; *Hoghton v. Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; *Von Stentz v. Comyn*, 12 Ir. Eq. 622; *Ingram v. Wyatt*, 1 Hagg. 384; *Panton v. Williams*, 2 No. of Cas. Suppl. p. xxi. In the case of *Ashwell v. Lomi*, tried in the Prerogative Court of Canterbury, June, 1850, and reported in small print, L. R., 2 P. & D. 477, as an appendix to *Parfitt and Lawless*, the head-note is as follows:—Although there is no rule of law which forbids a man to bequeath his property to his medi-

cal attendant, yet it is not a favourable circumstance for one in such a confidential position, with respect to a patient labouring under a severe disease, to take a large benefit under the said patient's will, more particularly if it be exercised with secrecy, and the whole transaction assume the character of a clandestine proceeding. In such a case the onus will lie very heavily upon the party benefited to maintain the validity of the will; and in a later case Sir James Hannen said, "He had had on several occasions before to impress upon the minds of all who might be concerned in the making of wills this most important principle—that if a person were called upon to prepare a will in his or her favour it was incumbent on that person, for his own protection, that he should call in some independent witness who might prove that the instructions for the will came from the testator, and that it fairly represented his wishes. The principle upon which the Court dealt with such subjects was expressed in the passage which he should quote from 'Wms. on Exors.' (vol. i. 8th ed. p. 113), being the judgment of the Privy Council in the case of *Barry v. Butlin*. The second principle is, 'that if a party writes or proposes a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be

Parfitt v.
Lawless, per
Lord Pen-
zance.

“ In Courts of Equity persons standing in certain relations to one another,—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward,—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract be made in favour of him who holds the position of influence, the Courts of Equity cast upon the former the burthen of proving that the transaction was fairly conducted as between strangers. . . . For in the case of gifts or other transactions *inter vivos*, it is considered by the Courts of Equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed ‘in such a position as would enable him to form an absolutely free and unfettered judgment’ ” (b).

Wingrove v.
Wingrove.
Lord Hannen.

As recently as November 19, 1885, Lord Hannen made the following observations on the subject of undue influence (c):—“ I find from now a long experience in this Court that there is no subject upon which there is a greater misapprehension.

“ The misapprehension to which I have referred arises from a particular form of the expression. We are all familiar with the use of the word ‘influence;’ we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it

vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased.’ ” *Scarman v. Collins*,

Times, November 5th, 1880.

(b) *Per* Lord Penzance, in *Parfitt v. Lawless*, L. R., 2 P. & D. at pp. 468, 469; citing *Archer v. Hudson*, 6 H. of L. Cas. at p. 49.

(c) *Wingrove v. Wingrove*, 11 P. D. 81; 55 L. J., P. D. & A. 7; 34 W. R. 260; 50 J. P. 56.

is not because one person has unbounded influence over another that, therefore, when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean: a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that, again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

Undue influence, will obtained by.

“To be undue influence in the eye of the law, there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person’s favour; because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence.

Must be coercion.

“The coercion may, of course, be of different kinds: it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness, and pressing something upon him may so fatigue

Coercion may be of various kinds.

Undue influence,
what is.

the brain that the sick person may be induced, for quietness sake, to do anything. This would equally be coercion, though not actual violence.

Wingrove v.
Wingrove,
per Lord
Hannen.

“ These illustrations will sufficiently bring home to your minds that even very immoral considerations, either on the part of the testator, or of someone else offering them, do not amount to undue influence, unless the testator is in such a condition that if he could speak his wishes to the last, he would say, ‘ this is not my will, but I must do it.’ ”

“ If, therefore, the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish—though you may condemn any person who has endeavoured to persuade, and has succeeded in persuading, the testator to adopt that view—still it is not undue influence.

“ There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced.”

In *Parker v. Duncan* (d), the plaintiff who propounded an alleged last will, was chairman of the board of guardians in whose workhouse infirmary the testator was an inmate at the time of its execution, and in which she died. It appeared that the plaintiff procured from a solicitor a form of will filled up in pencil, but declined to allow the solicitor to see the deceased. The plaintiff then proceeded to the infirmary accompanied by a friend of his own, and the testatrix, in their presence and that of a nurse, put her mark to the form of will the plaintiff had brought with him. The Court held that these facts were sufficient to support a plea of undue influence.

“Persons in the sea service are frequently under the pressure of urgent wants, and to procure an immediate supply of those wants (such as an outfit, or the like) they will, without thought, comply with almost any condition proposed to them. These temporary necessities have been considered to operate on them as a sort of duress on the part of those who are to furnish the supply; and it is partly on this consideration that the policy of the law has been extended to guard the testamentary acts of this class of persons” (e). Wills of seamen.

By statute 9 & 10 Will. 3, c. 41, s. 6, it is provided, “that no will of any seaman contained, printed, or written, *in the same instrument, paper, or parchment, with a warrant or letter of attorney*, shall be good or available in law to any intent or purpose whatsoever” (f). Statutory restrictions on.

This statute was afterwards repealed, but its provisions were again re-enacted in several subsequent statutes, viz., 55 Geo. 3, c. 60, s. 4; 1 Will. 4, c. 20; 28 & 29 Vict. c. 72, s. 4 (g).

Shortly after the passing of the statute of Will. III. it was decided, in the case of *Craig v. Lester* (h), that a will made by a seaman as a security for a debt was void, even though executed on a different instrument from a power of attorney, and this case was “followed by numerous others in the Prerogative Court, fully establishing that wills made by mariners as securities for debts are void. Seaman and agent.

“But neither the statute nor these decisions must be understood as making the relation of agent and seaman, or the circumstance of the seaman being indebted to his agent, an absolute defeasance to the will, so that it could, in no case, be valid.

“The proper result to be deduced is, that when the relation of agent and seaman exists, there must be clear

(e) Wms. on Exors. 9th ed. 44, 45.

p. 44; see also *Zacharias v. Collis*, (g) *Ibid.* p. 44.

3 Phill. 177. (h) *Ibid.*; cited by Sir John

(f) Wms. on Exors. 9th ed. pp. Nicholl in *Zacharias v. Collis*, *supra*.

Result of cases as to wills of seamen.

proof not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect: that, wherever it is executed merely as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will, the instrument shall be valid" (*h*).

Liability as to costs where undue influence improperly alleged.

It may, perhaps, be thought that having regard to the scope of this work, I have somewhat burdened the text of this chapter with unnecessarily long extracts from judgments. But in the words of the present President of the Probate Division, reported in the "Times" as these pages go to print (*i*), "It is the salutary rule of the Court that where undue influence is charged and not established, the party putting forward that charge should be condemned in costs." And this rule applies with equal, if not greater, force to fraud. It is, therefore, impossible to impress too often upon practitioners the extreme danger—I might say *iniquity*—of putting pleas of *fraud* or *undue influence* on the record, unless there is a reasonable prospect of establishing these pleas in the strict legal sense of the terms; and I cannot help thinking, if the full text of such judgments as those of Lord Penzance in *Parfitt v. Lawless*, and of Lord Hannen in *Wingrove v. Wingrove*, had been more often studied, a great deal of hardship would have been spared to litigants during the last few years (*k*).

(*h*) Wms. on Exors. 9th ed. p. 45. See also *Zacharias v. Collis*, 3 Phill. 202; *Deardsley v. Fleming*, 2 Lee, 98; *Florance v. Florance*, 2 Lee, 87.

(*i*) *Groffman v. Groffman*, Times, Oct. 28, 1891.

(*k*) See further on this subject, *post*, Chap. XXX.

CHAPTER VI.

WHO MAY MAKE A WILL—PERSONS INCAPABLE BY OPERATION
OF LAW—MARRIED WOMEN—TRAITORS AND FELONS—
OUTLAWS—PERSONS EXCOMMUNICATE—PERSONS GUILTY
OF CRIMES SHORT OF FELONY.

THE power of married women to dispose of real and personal estate is now regulated by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). But inasmuch as this statute applies to no will made before January 1st, 1883, and the larger number of married women living in this country at the present time were married before that date, it is still necessary to go fully into the testamentary position of married women not affected by the statute (*a*).

Married
women.

By the civil law a married woman might make a will as though she were a *feme sole* (*b*).

Married
women,
wills of.

By 34 & 35 Hen. 8, c. 5, s. 14, all wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, shall not be taken to be good or effectual in law.

34 & 35 Hen. 8,
c. 5, s. 14.

By the Wills Act, 1 Vict. c. 26, s. 8, no will made by any married woman shall be valid, except such as might have been made by a married woman before the passing of that act.

1 Vict. c. 26,
s. 8.

“But this section does not exclude the wills of married women from the operation of the 24th section as to a will speaking as to the real and personal estate comprised in it, as if executed immediately before the testator's death, or

(*a*) See on this subject generally, (b) 2 Bl. Comm. 297.

Wms. on Exors. 9th ed. pp. 46–59.

Married women.
Will made before Jan. 1, 1883.

Will made during husband's lifetime previous to Married Women's Property Act, 1882.

Women married before Jan. 1, 1883.

May bequeath property acquired by her as executrix.

of the 27th section, as to a general gift being an execution of a power" (c).

But at the same time it has been held that this section does not speak retrospectively, so as to operate to give effect to her will made during her husband's lifetime, when she had no power to make it, unless such will has been re-executed after his death (d); and this decision has since been held to be unaffected by the passing of the Married Women's Property Act, 1882 (e).

So, where a banking account was kept in the joint names of husband and wife, and investments were made in their joint names, and the wife survived her husband five days, having executed a will during coverture. The Court held that the balances of the joint account and the joint investments survived to the wife, but did not pass under her will (f).

Therefore, a woman married before January 1st, 1883, cannot make a will disposing of any real or personal property her title to which accrued before the passing of the Married Women's Property Act, 1882, for all her goods and chattels are the property of her husband, and a will made by her is a nullity and cannot be admitted to probate (g).

A married woman may, however, dispose by will of property acquired by her in the character of executrix; but, "the effect of such an instrument is merely to pass, by a pure right of representation, to the testator or prior owner, such of his personal assets as remain outstanding,

(c) Wms. on Exors. 9th ed. pp. 46, 47. See also *Noble v. Phelps*, L. R., 2 P. & D. 276; 40 L. J., P. & M. 60; 25 L. T. 65; 19 W. R. 1115; *Thomas v. Jones*, 1 De G. J. & Sm. 63.

(d) *Willock v. Noble*, 7 L. R., H. L. 580; 44 L. J., Ch. 345; 32 L. T. 419; 23 W. R. 809.

(e) *In re Price*, 28 Ch. D. 709; 54 L. J., Ch. Div. 509; 52 L. T. 430;

33 W. R. 20; and see *post*, p. 55.

(f) *In re Young*, 28 Ch. Div. 705; 54 L. J., Ch. D. 1065; 52 L. T. 754; 33 W. R. 729.

(g) See 2 Bl. Comm. 498; *Andrew Agnell's case*, 4 Co. 51 b; *Steadman v. Powell*, 1 Add. 58; *Bransby v. Haines*, 1 Cas. temp. Lee, 120; *Tucker v. Inman*, 4 M. & Gr. 1076. As to property coming to her after the Act, see *post*, pp. 55, 56.

and no beneficial interest which the wife may have in any part of them; and with respect to the assets which may have been received by the feme executrix during the marriage, and not disposed of, they immediately become the husband's property, and are not affected by the will" (*h*).

Will of married woman made before January 1, 1883.

A husband may assent to his wife making her will, but such assent is only a waiver of his rights as her administrator, and can only give validity to the will in the event of his being the survivor (*i*).

Made with assent of husband.

But a general assent of the husband is not sufficient; he must assent to the particular will, and his consent should be given when it is proved (*k*). He may revoke his consent during her life or at any time before probate, though if he once act on the will he cannot revoke his consent, and where there is an express agreement slight proof of consent will suffice (*l*).

Assent may be revoked before probate.

And where a married woman made a will with the assent of her husband, and after her death he assented to the will, it was held that he could not afterwards revoke that assent, and that therefore the will was entitled to probate (*m*).

In *In the goods of Cooper* (*n*), a will was made by a

In the goods of Cooper.

(*h*) Wms. on Exors. 9th ed. p. 47; see also *Scammell v. Wilkin-son*, 2 East, 552; *Tucker v. Inman*, 4 M. & Gr. 1076; *Hodsden v. Lloyd*, 2 Bro. C. C. 534, 543; 2 East, 556, 557; and see further, as to right of husband to oppose grant of probate to wife where she has been appointed sole executrix, *Clerke v. Clerke*, 6 P. D. 103; 50 L. J., P. D. & A. 69; 29 W. R. 823; 45 J. P. 588.

L. R., 2 P. & D. 276; 40 L. J., P. & M. 60; 25 L. T. 65; 19 W. R. 1115; *Willock v. Noble*, L. R., 7 H. L. 580; 44 L. J., Ch. D. 345; 32 L. T. 419; 23 W. R. 309.

(*k*) See *Willock v. Noble*, ante, p. 48; see also *Rex v. Bettesworth*, 2 Stra. 89; *Henley v. Phillips*, 2 Atk. 48.

(*l*) See Wms. on Exors. 9th ed. p. 48.

(*i*) See *In the goods of Smith*, 1 S. & T. 127; 27 L. J., P. & M. 39; 4 Jur., N. S. 1193; *Tucker v. Inman*, 4 M. & Gr. 1076; *Price v. Parker*, 16 Sim. 198; *Noble v. Phelps*,

(*m*) *Chappell v. Charlton*, 56 L. J., P. D. & A. 73; 57 L. T. 496; 51 J. P. 215.

(*n*) 6 P. D. 34; 50 L. J., P. D. & A. 41; 44 L. T. 111; 29 W. R. 444; 45 J. P. 472. See also *Brook*

Will of married woman made before January 1, 1883.

married woman who appointed her husband one of her executors. He assented to the will, and after her death expressed his intention to take probate, but died before doing so. Upon this the Court held that he had assented to the probate.

Disposing of real estate. Renunciation by husband.

The power of a married woman to dispose of her estate by will with the assent of her husband applies only to her personal estate. Her primary incapacity to dispose of realty arises, not from her husband's interest in her real estate, but, as has been seen (*o*), from the statutory provisions of 34 & 35 Hen. 8, c. 5. Therefore it has been held, in a recent case, that the mere renunciation by an intended husband of his marital rights in his wife's real estate is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. And under such circumstances, on her death during her husband's lifetime without issue, her heir-at-law, and not the devisee under her will, will take any land of which she was seised in fee simple (*p*).

Made under express agreement.

Before the passing of the Married Women's Property Act, 1882, "it often occurred that a will of a married woman was made in pursuance of an agreement before marriage, or of an agreement made after marriage, for consideration. Wills of married women made under such circumstances fall under the same rules as those made by a feme covert under a power, concerning which it is thought more advisable to refer the reader to the several learned treatises on the subject than to enlarge this work by a farther discussion of it" (*q*).

Property settled or given to sole and separate use.

Where property was actually given or settled, or agreed to be given or settled, to the sole and separate use of a wife, she took it with all its privileges and incidents, one

v. Turner, 2 Mod. 172; *Maas v. Sheffield*, 1 Robert. 364; 4 N. of C. 350; Fraser's note to *Forse and Hembling's case*, 4 Co. Litt. 61 b. (*p*) *Dye v. Dye*, 13 Q. B. D. 147; 53 L. J., Q. B. D. 442; 51 L. T. 145; 33 W. R. 2. (*q*) Wms. on Exors. 9th ed. p. 49. (*o*) *Ante*, p. 47.

of which was the power of bequeathing. "And it may be stated as a general rule, that personal property which has been acquired by a married woman under such circumstances that it became her separate estate, may be dealt with by her as if she were a *feme sole*" (r). Will of married woman made before January 1, 1883.

And this power extended to the produce and accretions of such property (s); and it made no difference whether the property were vested in trustees or in the wife herself. Produce and accretions of separate estate.

Where a husband opposed his wife's will which purported to dispose of separate estate, on the ground—amongst others—that she had no separate estate; Butt, J., having satisfied himself by evidence that she had such separate estate, pronounced for the will with costs. But he declined an application to inquire of what such separate estate consisted, or what was the proper destination of the property, on the ground that such matters ought more properly to be inquired into in the Chancery and not in the Probate Division (t). *Harding v. Sutton.*

A testamentary appointment, made by a married woman by virtue of a power, cannot be made available either in law or equity without probate (u). But it has been held that a will of a married woman made during coverture under a power, and disposing of real estate only, is not Will of married woman executed under a power.

(r) *Ibid.* p. 54. See also *Fettyplace v. Gorges*, 1 Ves. jun. 46; *S. C.* 3 Br. C. C. 8; *Peacock v. Monk*, 2 Ves. sen. 191; *Rich v. Cockell*, 9 Ves. 369; *Wagstaff v. Smith*, 9 Ves. 520; *Hulme v. Tenant*, 1 Br. C. C. 16; *Sockett v. Wray*, 4 *ibid.* 487; *Sturgis v. Corp*, 13 Ves. 192; *Essex v. Atkins*, 14 Ves. 542; *Heatley v. Thomas*, 15 Ves. 596; *Dalbiac v. Dalbiac*, 16 Ves. 116; *Bullpin v. Clarke*, 17 Ves. 365; *Power v. Bailey*, 1 Ball & Beatty, 49; *Greatley v. Noble*, 3 Madd. 94; *Stuart v. Ld. Kirkwall*, *ibid.* 389; *Aguilar v. Aguilar*, 5 Madd. 418; *Howard v. Damiani*, 2 Jac. & Walk. 458; *Acton v. White*, 1 Sim. & Stu. 429; *Braham v. Burchell*, 3 Add. 263 (in judgment of Sir J. Nicholl, note to *Forse and Hembling's case*, 4 Co. 61); *Haddon v. Fladgate*, 1 S. & T. 48; 27 L. J., P. & M. 21.

(s) See Wms. on Exors. 9th ed. p. 54. See also *Herbert v. Herbert*, Prec. Ch. 44; 1 Eq. Ca. Abr. 66, 68; *Moore v. Barber*, 34 L. J., Ch. 667; *Braham v. Burchell*, 3 Add. 263; *Tappenden v. Walsh*, 1 Phill. 352.

(t) *Harding v. Sutton*, 59 L. T. 838.

(u) See Wms. on Exors. 9th ed. p. 50.

Will of married woman made before January 1, 1883.

Made under power.

entitled to probate even though there be an appointment of executors (*x*).

On the other hand, where a married woman having a power of appointment executed the power in favour of herself, and afterwards made a will by which she appointed an executor, and directed him to sell a portion of her estate for the purpose (among other things) of paying legacies and erecting a memorial window, the Court held that as she possessed the property as her separate estate, and had appointed an executor, and directed him to pay legacies, &c., and as arrears of rent were due at the time, and such arrears of rent formed part of her personal estate, the will was entitled to probate (*y*).

Probate to executor of will made under power, without husband's consent.

Probate of the will of a married woman made under a power was always granted to the executor, without the husband's consent, the probate being limited to the property comprised in such power. For, in such a case, the executors do not take *jure representationis*, but merely under the power which she was authorized to exercise by making a will as to the particular property, and consequently there was an intestacy as to property not disposed of by the power (*z*).

Functions of Court of Probate as to construction of power.

At one time the Court of Probate merely granted probate of a will of a married woman purporting to be made by virtue of a power, leaving it to a competent Court of construction to decide whether the testamentary paper is a due execution of or operative under the power (*a*).

(*x*) *In the goods of Tomlinson*, 6 P. D. 209; 50 L. J., P. D. & A. 74; 30 W. R. 61; see *O'Dwyer v. Geare*, 1 S. & T. 465; 29 L. J., P. & M. 47; 5 Jur., N. S. 1366; *In the goods of Barden*, L. R., 1 P. & D. 325.

(*y*) *Brownrigg v. Pike*, 7 P. D. 61; 51 L. J., P. D. & A. 29; 46 L. T. 821; 30 W. R. 567; 46 J. P. 360; see also *In the goods of Hornbuckle*, 15 P. D. 149; 59 L. J.,

P. D. & A. 78; 63 L. T. 464; 39 W. R. 80.

(*z*) Wms. on Exors. 9th ed. pp. 50, 52; see also *In the goods of O'Dwyer*, 1 S. & T. 465; 29 L. J., P. & M. 47; 5 Jur., N. S. 1366; *Tugman v. Hopkins*, 4 M. & Gr. 389; *In the goods of Joys*, 30 L. J., P. & M. 169; *In the goods of Mason*, *ibid.*, 168.

(*a*) Wms. on Exors. pp. 50—52; see also *Barnes v. Vincent*, 4 N. of

Now, however, by virtue of the Judicature Acts, the Probate Division, as one of the Divisions of the High Court, is itself a Court of construction (*b*). “Thus, in the present day, it would seem that in a case of the will of a married woman made under a power it would not only be competent to, but also incumbent upon, the Probate Division, if the Court had all persons interested before it, to decide the question, not only whether there was a power, but whether it was well executed” (*c*).

Will of married woman made before January 1, 1883.

A married woman who survived her husband might render a will made by her, either previous to her marriage or during coverture, effectual by re-execution or by a codicil, showing an intention to revive, as provided by the 22nd section of the Wills Act (*d*).

Re-execution after husband's death
1 Vict. c. 26, s. 22.

By sect. 21 of the Matrimonial Causes Act, 1857 (*e*), “a wife who has obtained a protection order by reason of her husband having deserted her, shall, during the continuance thereof, be and be deemed to have been during such desertion of her in like position in all respects with regard to her property as she would be if she had obtained a decree of judicial separation.” And the position of a woman who has obtained a decree of judicial separation, with regard to property acquired by her from the date of the sentence, is, that such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead (*f*).

Protection order.

Judicial separation.

C., Suppl. XVI.; *S. C.*, 5 Moo. P. C. 201. See also *Tatnall v. Hankey*, cited Trist. on Prob. 10th ed. p. 151.

(*b*) *Ante*, p. 8.

(*c*) *Wms. on Exors.* 9th ed. p. 52; *Tharp v. McDonald*, 3 P. D. 76; 38 L. T. 867; 27 W. R. 770; *Phillips v. Jenkins*, 44 L. T. 281.

(*d*) As to which see *post*, p. 97 *et seq.*; see also *In the goods of Heathcote*, 6 P. D. 30; 50 L. J., P. D. & A.

42; 44 L. T. 280; 29 W. R. 356; 45 J. P. 361; *Whitby v. Highton*, 57 L. J., Ch. D. 430; 58 L. T. 842; 36 W. R. 683; *Bilke v. Roper*, 46 Ch. D. 632; 63 L. T. 448; 39 W. R. 93.

(*e*) 20 & 21 Vict. c. 85.

(*f*) *Ibid.* s. 25. See also *In the goods of Worman*, 1 S. & T. 513; 29 L. J., P. & M. 164; 5 Jur., N. S. 687; *In the goods of Faraday*, 2 S. & T. 369; 31 L. J., P. & M. 7; 7 Jur., N. S. 1252; *Mudge v. Adams*,

Will of married woman made before January 1, 1883.

Valid by law of domicil.

Queen Consort.

Husband banished by Act of Parliament.

Wife of felon.

And where a married woman was a native of Spain and died domiciled there, and it appeared upon affidavit that, by the law of Spain, she had power to bequeath property brought to her husband by her upon their marriage, probate was granted of her will (*e*).

The Queen Consort is an exception to the general rule as to married women; for she may dispose of her chattels without the consent of her lord (*f*).

“A woman whose husband is banished by Act of Parliament may make a will and act in every respect as a *feme sole*” (*g*).

In the case of *In the goods of Coward* (*h*), it was decided that the wife of a convicted felon was in the same position as a *feme sole* with respect to her testamentary capacity; but since the passing of 33 & 34 Vict. c. 23 (*i*), it may be questioned whether this is the case.

The following are the sections of the Married Women's

6 P. D. 54; 50 L. J., P. D. & A. 49; 44 L. T. 185; 29 W. R. 307; *Mahoney v. McCarthy*, (1892) P. 21; 61 L. J., P. D. & A.

(*e*) *In the goods of Maraver*, 1 Hagg. 498. See as to wills of married women generally, *In the goods of De Pradel*, L. R., 1 P. & D. 454; 37 L. J., P. & M. 2; 17 L. T. 220; *Paglar v. Tongue*, L. R., 1 P. & D. 158; *In the goods of Fenwick*, *ibid.* 319; 36 L. J., P. & M. 54; 16 L. T. 124; *Hawkesley v. Barrow*, L. R., 1 P. & D. 147; 35 L. J., P. & M. 67; 14 L. T. 672; 14 W. R. 822; *In the goods of Eustace*, L. R., 3 P. & D. 183; 43 L. J., P. & M. 46; *In the goods of Elliott*, L. R., 2 P. & D. 274; 40 L. J., P. & M. 76; 25 L. T. 203; 19 W. R. 1072; *In the goods of Crofts*, L. R., 2 P. & D. 18; *In the goods of Graham*, L. R., 2 P. & D. 385; 41 L. J.,

P. & M. 46; 26 L. T. 529; 20 W. R. 614; *Askew v. Rooth*, L. R., 17 Eq. 426; 43 L. J., Ch. 368; 30 L. T. 155; 22 W. R. 524; *In the goods of Fraser*, L. R., 2 P. & D. 183; 39 L. J., P. & M. 20; *Bishop v. Wall*, L. R., 3 Ch. Div. 194; 45 L. J., Ch. 194; 25 W. R. 93; *Sotheran v. Denning*, 20 Ch. D. 99; *Wilkins v. Pryer*, 32 Ch. D. 604; 55 L. J., Ch. D. 598; 54 L. T. 753; 34 W. R. 634; *In the goods of Miles*, 59 L. J., P. D. & A. 59; 62 L. T. 607.

(*f*) Wms. on Exors. 9th ed. p. 59.

(*g*) *Ibid.*; see also *Portland v. Prodgers*, 2 Vern. 385; *Crompton v. Collinson*, 2 Bro. C. C. 385.

(*h*) 4 S. & T. 46; 34 L. J., P. & M. 120; 13 L. T. 210; 11 Jur., N. S. 569. See also *In the goods of Martin*, 2 Rob. 205.

(*i*) Whereby forfeiture for felony is abolished.

Property Act, 1882 (*k*), bearing on the testamentary powers of married women:—

By sect. 1, sub-sect. 1—"A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

By sect. 2—"Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

By sect. 4—"The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

By sect. 5—"Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid."

By sect. 23—"For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Will of married woman made since January 1, 1883.

Sect. 1, sub-sect. 1. Married woman to be capable of holding property and contracting as a *feme sole*.

Sect. 2. Property of a woman married after the Act to be held by her as a *feme sole*.

Sect. 4. Execution of general power.

Sect. 5. Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

Sect. 23. Legal representative of married woman.

Will of married woman made since January 1, 1883.

“The general effect of this Act on the testamentary capacity of women married on or after January 1st, 1883, would seem to be that a married woman can, during coverture, dispose by will of all property which she then (during coverture) has, whether real or personal, as if she were a *feme sole*, and the property limited to her separate use; while with regard to women married before that date, their testamentary capacity is limited to property to which their title accrues after that date, including any wages, earnings, money, or property gained or acquired by them as aforesaid in the Act, which would seem to be their personal earnings after marriage, as defined in sect. 2 of the Act” (*l*).

Probate of will of married woman before Married Women's Property Act, 1882.

Previous to the passing of this Act it was the practice of the Probate Registry to specify in the grant of probate, or administration with the will annexed, of a married woman, the power under which the will purported to have been made. In consequence of the passing of the Married Women's Property Act, 1882, certain rules (*m*), whereof the following is the substance, were passed on March 29th, 1887 :—

Since Married Women's Property Act, 1882.

“In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix, or the power or authority under which the will has been, or purports to have been, made. The probate, or letters of administration with will annexed, in such cases shall take the form of ordinary grants of probate, or letters of administration with will annexed, without any exception or limitation, and issue to an executor or other person authorized in the usual course of representation to take the same; a surviving husband, however, being entitled to the same

(*l*) Wms. on Exors. 9th ed. p. 52 L. T. 430 ; 33 W. R. 20.
 57. See also *In re Price*, 28 Ch. Div. 709 ; 54 L. J., Ch. D. 509 ; (*m*) Rules 15 and 18, Probate Rules (Non-Contentious Business).

in preference to the next of kin of the testatrix in case of a partial intestacy."

Shortly after these rules came into force, the Court was moved for a grant limited in the old form to the personal estate which she had a right to dispose of by will; but it was held that under the new rules the grant could no longer be limited but must be in a general form (*n*). And this decision was shortly afterwards followed in the case of *In the goods of Price* (*o*).

The following is the text of the judgment of Butt, J. (now the President of the Probate Division), in that case (*p*):—

"This is an application for granting probate of a will of a married woman disposing of her separate property. The will was dated February 5, 1885, and the executor and executrix appointed under the will applied to the registry for a general grant. This was refused, as contrary to the prevailing practice. Thereupon, application was made to me by motion to direct a grant to issue without the usual words limiting it not only 'to such property as the testatrix had a right to dispose of,' but also 'to such property as she has disposed of by her will.' It was contended that since the Married Women's Property Act, 1882, no reason exists for limiting the grant. Although I understand the grounds on which the practice was based, I have not been able to satisfy myself of its necessity even before the Act of 1882. Now, at all events, since that Act, a married woman having full power to dispose of her separate estate, I think the limitation ought no longer to be insisted on.

"The policy of recent legislation having been to place a married woman, so far as her separate estate is concerned,

Will of married woman made since January 1, 1883.

Probate—old form of grant no longer necessary.

In the goods of Price, per Butt, J.

(*n*) *In the goods of Homfray*, 12 P. D. 138, n.; 57 L. T. 498, n.; 51 J. P. 615.

(*o*) 12 P. D. 137; 56 L. J., P. D. & A. 72; 57 L. T. 497; 35 W. R. 596; 51 J. P. 615.

(*p*) 12 P. D. at p. 138.

Will of married woman made since January 1, 1883.

in the position of a *feme sole*, I direct probate to issue as prayed.

“As this will alter a long-established practice, I thought it right to speak to the President before deciding this case, and I may say that he approves of the course which I am now taking.”

Dealing only with realty.

In *In the goods of Cubban* (q), Aug. 10, 1886, it was held that the will of a married woman dealing only with realty, but appointing executors, was entitled to probate, where a portion of the estate consisted of personalty vested in her by virtue of the Married Women's Property Act, 1882.

Statute of Mortmain, 43 Geo. 3, c. 108,

By 43 Geo. 3, c. 108, an Act passed to modify the more stringent provisions of the Mortmain Acts, all persons having an interest in land, *with the exceptions of married women without their husbands' consent and persons under age*, are enabled to give by will *executed three months at least before death lands not exceeding five acres, or goods and chattels not exceeding in all 500l., for the erection of any church.*

unaffected by Married Women's Property Act, 1882.

In a recent case in the Chancery Division it has been held that the provisions of this statute are not affected by sect. 1, sub-sect. 1 of the Married Women's Property Act, 1882, and that married women are therefore, to this extent, still intestable (r).

Felon.

By 33 & 34 Vict. c. 23, forfeiture for treason and felony has been abolished, and it would seem to follow that traitors and felons are no longer incapacitated from making wills.

Outlaw.

Outlaws are incapable of making a will as long as their outlawry subsists, for their goods and chattels are forfeited during that time (s).

(q) 11 P. D. 169; 55 L. J., P. D. & A. 77; 57 L. T. 87; 35 W. R. 200; 50 J. P. 744.

(r) *In re Smith's Estate*, 35 Ch. D. 589; 56 L. J., Ch. D. 726; 56 L. T. 850; 35 W. R. 514; 51

J. P. 692.

(s) See, on the subject of persons incapable from their criminal conduct of disposing of their property by will, Wms. on Exors. 9th ed. pp. 59—61.

CHAPTER VII.

OF HOW A WILL MAY BE EXECUTED (*a*).

IT is now more than fifty-four years since the Wills Act (1 Vict. c. 26) came into force, and it seems, therefore, no longer desirable to burden the text of a practical treatise like the present with any statement of the law as to the execution of wills as it existed previous to January 1st, 1838.

Wills before
the passing of
the Wills Act,
1 Vict. c. 26.

The only probable case in which that law may have to be considered by the Probate Division at the present time is, if any point should arise as to the will of a soldier made whilst on actual military service or of a mariner or seaman being at sea, such wills being excepted from the operation of the Wills Act by sect. 11 (*b*).

A will dated subsequently to the 31st December, 1837, must be shown to have been executed according to the form prescribed by the Wills Act, sect. 9 (that is to say), "it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary (*c*)."

Wills since
passing of
the Wills Act,
1 Vict. c. 26,
s. 9.

(*a*) See, on this subject, Wms. on Exors. 9th ed. pp. 64—93.

(*b*) For statements of the law as it stood previous to the passing of the Wills Act, see Powles's

Browne on Probate (Lond. 1881), pp. 59—65, and Wms. on Exors. 8th ed. Pt. I. Bk. II. Ch. II. § 1.

(*c*) 1 Vict. c. 26, s. 9.

1 Vict. c. 26,
s. 10.

By section 10, "No appointment made by will, in exercise of any power, shall be valid unless the same be executed in manner hereinbefore required (*d*); and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity" (*e*).

Locke King's
Act, 15 Vict.
c. 24, s. 1.

The 9th section was amended by a later statute (*f*), known as Locke King's Act. "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause, or of the clause of attestation, or shall follow, or be after, or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other

(*d*) *I.e.* by s. 9.

(*e*) See *Hubbard v. Lees*, 4 H. & C. 418; L. R., 1 Ex. 255; 12 Jur., N. S. 435; *Taylor v. Meade*, 34 L. J., Chanc. 203; 10 Jur., N.

S. 1012; 13 W. R. 394; *Attorney-General v. Brackenbury*, 1 H. & C. 782.

(*f*) 15 Vict. c. 24, s. 1.

portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written, to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

Locke King's
Act, 15 Vict.
c. 24, s. 1.

This is, therefore, the general form in which every will must be executed, with the exception of the wills of soldiers in active service and sailors at sea, which we will hereafter consider. (1 Vict. c. 26, s. 11.)

Exceptions.

The signature of a competent testator (whether educated or illiterate) is sufficient if it be made by affixing his mark (*g*), or by stamping his name (*h*), or, in case of extreme weakness, if his hand be guided either to make his mark or sign his name, as the case may be (*i*).

Testator's
signature.
By mark.

Even where the maiden name of the testatrix, who had been described throughout the will by her married name, was by mistake affixed to her mark (*k*), and also in a case where the testator was wrongly described throughout the will, but correctly described opposite his mark (*l*), the Court held that the documents were duly executed.

But in all these cases the Court must be satisfied by evidence that the mark was duly affixed (*m*), that the docu-

(*g*) *Jenkyns v. Gaisford*, 3 S. & T. 93; 32 L. J., P. & M. 122; see also, as to signature by stamp generally, *Schneider v. Norris*, 2 M. & S. 286.

(*h*) *Wilson v. Beddard*, 12 Sim. 28.

(*i*) *Taylor v. Dening*, 8 A. & E. 94.

(*k*) *In the goods of Clarke*, 27 L. J., P. & M. 18.

(*l*) *In the goods of Douce*, 2 S. & T. 593; 31 L. J., P. & M. 172.

(*m*) Especially where a document

By mark.

ment was executed *animo testandi*, and generally as to the *bona fides* of the transaction (*n*).

Signature of testator and witnesses on separate piece of paper affixed to will.

Where the signatures of the testator and witnesses appeared on a piece of paper, upon which no dispositive part of the will was written, but which was attached by a piece of string to the paper on which the will was written, just opposite to the termination of the writing, the Court, being satisfied that the papers were in the same state as when the witnesses signed them, held that the will was duly executed (*o*). But in such a case the Court must be satisfied that the paper was so affixed before execution (*p*).

Two papers, one signed by testator, the other by attesting witnesses.

Where, however, a will was written twice on different pieces of paper, and the two documents were differently worded, but were to the same effect, and by mistake one of them was signed by the testator and the other by the two attesting witnesses, it was held that there was no proper attestation, and that neither paper was entitled to probate (*q*).

Signature for the testator by "some other person

Where the name of the testator is signed by a third party at his request, as permitted by the statute, such signature must be accompanied by some word or act on the part of the testator, to show that it was made at his request (*r*). Sir H. J. Fust held, contrary to the opinion of Lord St. Leonards (*s*), that this might be done by one

is not presented for probate until after the lapse of some years; see *Edmonds v. Lewer*, 11 Jur., N. S. 911.

(*n*) See further as to signature of testator by mark, *In the goods of Shuttleworth*, 1 Curt. 911; *In the goods of Bryce*, 2 Curt. 325; *In the goods of Clarke*, *ibid.* 329; *In the goods of Glover*, 5 No. of Cas. Ecc. 553; *In the goods of Higgins*, 2 Robert. 339.

(*o*) *In the goods of Horsford*, L. R., 3 P. & D. 211; 44 L. J., P. & M. 9; see also *In the goods of Gausden*, 2 S. & T. 362; 31 L. J., P. & M.

53, where the piece of paper was pasted on to the will; and *Cook v. Lambert*, 3 S. & T. 46; 32 L. J., P. & M. 93; 8 L. T. 211; 9 Jur., N. S. 258; 11 W. R. 401, where it was affixed by wafers.

(*p*) See *In the goods of West*, 32 L. J., P. & M. 182.

(*q*) *In the goods of Hatton*, 6 P. D. 204; 50 L. J., P. D. & A. 78; 30 W. R. 62; 46 J. P. 40.

(*r*) *In the goods of Marshall*, 13 L. T. 643; and see *In the goods of Elcock*, 20 L. T. 757.

(*s*) Sugden's Essay on the Law of Wills, p. 38.

of the attesting witnesses (*t*) ; also that it was sufficient if the person signing signed his own name instead of that of the testator (*u*). in his presence and by his direction."

In considering the question of whether the signature of the testator is in a proper position within the meaning of the 9th section of the Wills Act (*x*) and the 1st section of the Amending Act (*y*), it must be borne in mind that the Court must in every case be satisfied by evidence, or by reasonable inferences, (1) That the testator duly wrote his name either with his own hand, or vicariously, as permitted by the Act, (2) That his name was on the will before the attesting witnesses wrote theirs. Position of testator's signature within 1 Vict. c. 26, s. 9 ; 15 Vict. c. 24, s. 1.

It must be further remembered, that "each case of this description depends upon its own peculiar circumstances" (*z*), and that wherever the recollection of the attesting witnesses or other persons, as to the circumstances attending the execution of the will, is defective, the Court is "at liberty to judge from the circumstances of the case, whether the name of the testator was on the will at the time of the attestation or not" (*a*). It has, however, been decided by the Court of Appeal that the witnesses must, at the time of the attestation, see or have the opportunity of seeing the signature of the testator (*b*). Position of testator's signature.

The 9th section of the Wills Act merely enacts that the will shall be signed "*at the foot or end thereof*" without further words of explanation. Sir H. J. Fust, after at first putting a very liberal construction on this part of the Act, subsequently, with the concurrence of the Judicial Committee of the Privy Council, felt it necessary to take a more rigid view, on the ground that these words were "Foot or end."

(*t*) *In the goods of Bailey*, 1 Curt. 914 ; *Smith v. Harris*, 1 Robert. 262.

(*u*) *In the goods of Clarke*, 2 Curt. 329 ; and see *Wms. on Exors.* 9th ed. p. 72.

(*x*) 1 Vict. c. 26, *ante*, p. 59.

(*y*) 15 Vict. c. 24, *ante*, p. 60.

(*z*) *Per Lord Penzance, In the goods of Woodley*, 3 S. & T. at p. 430.

(*a*) *Per Sir C. Cresswell, Gwillim v. Gwillim*, *ibid.* at p. 205.

(*b*) See *In the goods of Gunstan*, 7 P. D. 102 ; 51 L. J., P. D. & A. 36 ; 46 L. T. 641 ; 30 W. R. 505 ; disapproving *Gwillim v. Gwillim*.

Signature of
testator.

intended to prevent any addition being made to the will after the testator had executed it, and accordingly probate was refused in a number of cases, and the intention of a number of testators defeated (*c*).

Sufficient as
to position,
within
15 Vict. c. 24,
s. 1.

This led to the passing of the 15 Vict. c. 24, by which, as we have already seen (*d*), the words "foot or end" are sufficiently explained and enlarged as to include nearly every signature intended to give effect to a will, with the proviso that it is not to give effect to any dispositive part of such will, written after it was signed.

Position of
testator's
signature.

In the following cases the Court held that the wills were properly signed as to the position of the signature within the meaning of 15 Vict. c. 24, s. 1.

Where the testator's signature was written partly across the last line but one of the will and entirely above the last line, with the exception of one letter which touched the last line (*e*), and even where it was written above a dispositive portion of the will, it being clear that such dispositive portion was there before the will was signed (*f*), and where the signature of the testator appeared below that of the attesting witnesses, although in one case the attesting witnesses were dead (*g*), and in another case they could recollect nothing (*h*).

The same was held where the signature of the testator was on the fourth page of a sheet of paper, the will concluding in the middle of the third page (*i*); where the testator having obtained a form of will, lithographed on the

(*c*) See Wms. on Exors. 9th ed. p. 67.

(*d*) *Ante*, p. 60.

(*e*) *In the goods of Woodley*, 3 S. & T. 429; 33 L. J., P. & M. 154.

(*f*) *In the goods of Peach*, 1 S. & T. 138; *In the goods of Kimpton*, 3 S. & T. 427; 33 L. J., P. & M. 153; see also *In the goods of Catrall*, 33 L. J., P. & M. 106.

(*g*) *In the goods of Puddephatt*, L. R., 2 P. & D. 97; 39 L. J., P. & M. 84.

(*h*) *In the goods of Jones*, 46 L. J., P. & M. 80.

(*i*) *Hunt v. Hunt*, L. R., 1 P. & D. 209; see also *In the goods of Hammond*, 3 S. & T. 90; 32 L. J., P. & M. 200; *In the goods of Archer*, L. R., 2 P. & D. 252; 40 L. J., P. & M. 80.

first page only, wrote his will on the second and third pages, but signed his name at the bottom of the lithographed form (*k*), and where the testator's name was written only in the attestation (*l*) or testimonium (*n*) clause, but the will was not otherwise signed; where, for want of space, the signature of the testator was at right angles to the will (*n*); where the will being written on the first and second page of a sheet of paper, the signature of the testator was written on the third page (*o*); where the will being written on three sides of a sheet of paper, the signature of the testator was partly on the second and partly on the third page (*p*), and where the will being written on the first and third pages of a sheet of paper, the signature of the testator was written crossways on the second page (*q*).

1 Vict. c. 26,
s. 9.
Signature of
testator
sufficient.

But where the testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above or beside the signature, and immediately afterwards the witnesses signed their names, the Court held that he did not sign or acknowledge his signature to the will as containing such clause (*r*).

Signature of
testator
insufficient.

Again, where a testator, two days before his death, being paralyzed and partly speechless, intimated to his two medical men his desire to make a will, and they inter-

(*k*) *In the goods of Wotton*, L. R., 3 P. & D. 159; 43 L. J., P. & M. 14.

(*l*) *In the goods of Walker*, 2 S. & T. 354; 31 L. J., P. & M. 62; *In the goods of Huckvale*, L. R., 1 P. & D. 375; 36 L. J., P. & M. 84; *In the goods of Pearn*, 1 P. D. 70; 45 L. J., P. D. & A. 31; see also *In the goods of Harris*, 23 W. R. 734.

(*m*) *In the goods of Mann*, 28 L. J., P. & M. 19; *In the goods of Casmore*, L. R., 1 P. & D. 653; 38 L. J., P. & M. 54.

(*n*) *In the goods of Jones*, 4 S. & T. 1; 34 L. J., P. & M. 41.

(*o*) *In the goods of Wright*, 4 S. & T. 35; 34 L. J., P. & M. 104; *In the goods of Williams*, L. R., 1 P. & D. 4; 35 L. J., P. & M. 2.

(*p*) *In the goods of Powell*, 4 S. & T. 34; 34 L. J., P. & M. 107.

(*q*) *In the goods of Coombs*, L. R., 1 P. & D. 302; 36 L. J., P. & M. 25; see also *In the goods of Ainsworth*, L. R., 2 P. & D. 151.

(*r*) *In the goods of Arthur*, L. R., 2 P. & D. 273.

1 Vict. c. 26,
s. 9.

Testator's
signature
insufficient.

preted his wishes by signs, and wrote them on a card, and he executed the document by making his mark, which appeared in the middle of the writing, and they put their initials as witnesses at the back; it was held that though the card constituted a valid testamentary paper, duly witnessed, it was not signed at the "foot or end" within the meaning of the statute, and therefore not duly executed or entitled to probate (*s*).

Signatures of
testator and
attesting wit-
nesses on first
side of sheet
of foolscap.
Codicil on
third side.

And where a testator duly executed a will, prepared by a solicitor, and written on the first side of a sheet of foolscap, but desiring to alter the disposition of his property, called in a neighbour, who wrote a codicil on the third sheet of the foolscap, beginning "the following alterations having been first made," and ending with an attestation clause in due form; but the mark of the testator and the signatures of the attesting witnesses were written opposite the body of the will, on the margin of the first page; the codicil was held not to be duly executed (*t*).

If testator's
signature at
foot or end,
position of
witnesses'
signatures
of less
importance.

But, provided that the testator's signature is at the "foot or end" of the document, the position of the witnesses' signatures is not so important. So, where a testator left a codicil, entirely in his own handwriting, written on the third side of the sheet of foolscap, the first side of which contained his will, and there was an attestation clause in proper form, and the testator had signed his name at the foot of the codicil, but there being no more space on the sheet, the names of the attesting witnesses appeared at the bottom of the second page, opposite the attestation clause; and though they acknowledged their signatures, they had no recollection of having signed the paper, nor of having seen it before, the codicil was held to have been duly executed (*u*).

(*s*) *Margary v. Robinson*, 12 P. D. 8; 56 L. J., P. D. & A. 42; 57 L. T. 281; 35 W. R. 350; 51 J. P. 407

D. 107; 56 L. J., P. D. & A. 71; 57 L. T. 495; 35 W. R. 568.

(*u*) *Woodhouse v. Balfour*, 13 P. D. 2; 57 L. J., P. D. & A. 22; 58 L. T. 59; 36 W. R. 368; 52 J. P. 7.

(*t*) *In the goods of Hughes*, 12 P.

And whatever be the position of the testator's signature the Court must, as already stated, be satisfied that he wrote his name before the attesting witnesses wrote theirs (x). 1 Vict. c. 26, s. 9.

So, where the will of the deceased was written on a lithographed form, and extended over the first and second sides of a sheet of paper, and the form contained attestation clauses at the foot of the first and second sides of the paper, and the deceased made a mark in the blank spaces left for that purpose in both such clauses, and the attesting witnesses signed their names at the bottom of the first side only, and before the deceased made her mark on the attestation clause of the second side; the Court held that the only mark which could give validity to the will was on the second side, and having been made after the attesting witnesses had subscribed their names, the will was not sufficiently signed by the deceased (y). Insufficient execution, testator must sign before witnesses.

Again, where a will was written on a printed form by a testator's directions, and was contained partly on a first page, and partly on a second, and the attestation was at the bottom of the first page, and there was no attestation on the second page, the Court excluded the second page from probate (z).

The 9th section of the Wills Act (a) further provides,

(x) *In the goods of Hoskins*, 32 L. J., P. & M. 158; see also *Moore v. King*, 3 Curt. 243; *Re Byrd*, *ibid.* 117; *Re Allen*, 2 Curt. 331; *Re Olding*, *ibid.* 865; *Pennant v. Kingscote*, 3 Curt. 643; *Cooper v. Bockett*, *ibid.* 648; and see further *Charlton v. Hindmarsh*, 1 S. & T. 433; 28 L. J., P. & M. 132; and *Beckett v. Howe*, L. R., 2 P. & D. 1; 30 L. J., P. & M. 1.

(y) *In the goods of Dilkes*, L. R., 3 P. & D. 164; 43 L. J., P. & M. 38; see also *Phipps v. Hale*, L. R., 3 P. & D. 166; and see further as to position of testator's signature,

In the goods of Davis, 3 Curt. 748; *In the goods of Chamney*, 1 Robert. 757; *Roberts v. Phillips*, 4 E. & B. 450; *Ewen v. Franklin*, Deane's Ecc. Rep. 7; *Sweetland v. Sweetland*, 4 S. & T. 6; 34 L. J., P. & M. 42; *In the goods of Dallow*, L. R., 1 P. & D. 189; *In the goods of Pearse*, *ibid.* 382; and Wms. on Exors. 9th ed. pp. 67—70.

(z) *In the goods of Malen*, 54 L. J., P. D. & A. 91; 33 W. R. 825; 50 J. P. 262; see also *In the goods of Wray*, 31 W. R. 476; 47 J. P. 279.

(a) 1 Vict. c. 26.

1 Vict. c. 26,
s. 9.

Signature of
attesting wit-
nesses under.

No attesta-
tion clause
necessary.

Witness
must sign or
make mark.

Meaning of
term "sub-
scribe" in
sect. 9.

that the signature of the testator "shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

"It is, therefore, sufficient if the witnesses, without any attestation clause of any description, merely subscribe their names. But it must be observed, that unless there is an attestation clause, reciting that the formalities prescribed by the Act have been complied with, the executor cannot obtain probate in the usual way on his own oath alone, but must produce an affidavit from one of the attesting witnesses, or some other satisfactory evidence, showing that the solemnities have been performed, as required by the statute" (x).

To constitute a valid subscription by an attesting witness under this section, it is not necessary that he should actually sign his name, but he must at least make, or assist in making, some mark on the will, with the intention that that mark shall represent his signature (y).

It has been held that subscribed does not mean *written underneath* the testator's signature, but written upon the will with the intention of attesting it (z). Therefore, where the attesting witnesses signed their names in the margin of the first and second sheets opposite certain amendments, it was held, on proof that they signed with the intention of attesting the testator's signature, that this was a valid subscription within the requirements of the ninth section, and that the will might be admitted to probate (a). The witness's initials will suffice (b), and

(x) Wms. on Exors. 9th ed. pp. 81, 82. As to the course to be pursued in the registry, see *post*, Chap. XX.

(y) *Charlton v. Hindmarsh*, 1 S. & T. 433; affirmed on appeal, 8 H. L. Cas. 160; 28 L. J., P. & M. 132; where all the older authorities are

cited.

(z) See *Roberts v. Phillips*, 4 E. & B. at p. 455.

(a) *In the goods of Streatley*, (1891) P. 172; 60 L. J., P. D. & A. 56; 39 W. R. 432.

(b) *Re Christian*, 2 Robert. 110.

although able to write, he may nevertheless sign by mark (*c*), or if he be illiterate he may have his hand guided (*d*), or hold the top of the pen whilst someone else signs his name (*e*); nor need he sign his own name; so, where an attesting witness instead of his name wrote "servant to Mr. S.," intending at the time to attest the testator's signature, it was held a sufficient subscription (*f*).

1 Vict. c. 26,
s. 9.

Signature of
attesting
witnesses.

But the Court must be satisfied that whatever the attesting witness did was intended *as an act of attestation*; therefore, where an attesting witness, at the request of the testator, wrote the name of her husband instead of her own, not as an act of attestation, but because the testator had asked her to do so, the Court held that she had not duly subscribed the will (*g*); and the same was held in a recent case, where one of the attesting witnesses, at the request of the testator, signed her husband's name instead of her own, her husband being unable to write (*h*).

What witness
does must be
done as an
act of at-
testation.

Where, after a will had been executed and duly attested by two witnesses, the wife of the testator, who was also an executor, and took a life interest in the whole estate, signed her name to the will by the testator's request, not with the object of attesting it, but in order to verify its contents, the Court granted an application for probate of the will, omitting the signature of the wife, upon proof that notice of the application had been served upon a guardian appointed by the Court to represent children who had a reversionary interest in the will and were minors, and that no appearance had been entered (*i*).

Signature of
executor
added after
attestation.

(*c*) *Re Amiss*, 2 Robert. 116.

(*d*) *Harrison v. Elvin*, 6 Jur. 849;
6 Q. B. 117; *In the goods of Frith*,
27 L. J., P. & M. 6.

(*e*) *Lewis v. Lewis*, 2 S. & T.
153; 4 L. T. 583; reported as
In the goods of Lewis, 31 L. J.,
P. & M. 153; see also *In the goods*
of Kilcher, 6 No. of Cas. Ecc. 15.

(*f*) *In the goods of Sperling*, 3 S.
& T. 273; 33 L. J., P. & M. 25;
and see *In the goods of Oliver*, 2
Eccl. & Adm. 57.

(*g*) *Pryor v. Pryor*, 29 L. J., P.
& M. 114.

(*h*) *In the goods of Leverington*,
11 P. D. 80; 55 L. J., P. D. & A. 62.

(*i*) *In the goods of Smith*, 15 P.

1 Vict. c. 26,
s. 9.

Signature of
attesting
witnesses.

Insufficient
attestation;
not present
at same time.

Witness
cannot direct
third person
to sign
for him.

Where the deceased and one of the attesting witnesses having both *affixed* their marks, the second attesting witness then wrote the name of the deceased and of the first attesting witness against their respective marks, and also the word "*witness*," but did not himself otherwise subscribe the will, the Court held that he did not, by any word he wrote, attest the signature of the deceased (*k*).

Again, where the deceased signed her name in the presence of two witnesses, one of whom signed his name to the will, but the other, after writing his Christian name, was unable, through feebleness, to complete his signature, and subsequently a third person was introduced, and the deceased made her mark in the presence of such third person, and of the witness who had already signed his name, who then traced over his signature with a dry pen, and the last comer signed his name; the Court held that the execution was invalid, in the latter case, because the witnesses did not both attest and subscribe the signature of the deceased, and, in the former, by reason that one witness had no intention, by writing his Christian name only, to subscribe the will (*l*).

In every case the witness must take some share in the act of writing or marking the will. It is not sufficient that he direct some third person to sign his name for him (*m*).

D. 2; 59 L. J., P. D. & A. 5; 62 L. T. 183; 38 W. R. 384; 54 J. P. 199.

(*k*) *In the goods of Eynon*, L. R., 3 P. & D. 92; 42 L. J., P. & M. 52. See also *Playne v. Scriven*, 1 Rob. 772; *In the goods of Trevannion*, 2 Robert. 311.

(*l*) *In the goods of Maddock*, L. R., 3 P. & D. 169; 43 L. J., P. & M. 29. In giving judgment in this case Sir James Hannen cited *Casement v. Fulton* (5 Moo. P. C. 130), and *Playne v. Scriven* (1 Rob.

772), as authorities on the point as to the tracing over the signature with a dry pen; and *Hindmarsh v. Charlton* (8 H. of L. Ca. 160), as to the incomplete subscription of the witness; and distinguished the case from *In the goods of Sperling* (where the words "servant to Mr. S." were in substitution for the name of the witness, and not an incomplete signature), 3 S. & T. 273; 33 L. J., P. & M. 25.

(*m*) *In the goods of Duggins*, 39 L. J., P. & M. 24.

It must also be observed, that the witnesses must subscribe the will in that character and not (as sometimes happens) in some other character, such as that of trustee, or executor (*n*), although, if a witness has subscribed the will as witness, it will not invalidate his subscription that he has subscribed it in some other character as well (*o*).

1 Vict. c. 26, s. 9.
Signature of testator, what amounts to making or acknowledging in presence of witnesses under.

With respect to the making or acknowledgment of his or her signature by the testator or testatrix in the presence of the witnesses, as provided by sect. 9 of 1 Vict. c. 26, the decisions have been somewhat contradictory; but this, no doubt, is partly accounted for by the desire of the Courts, wherever possible, to give effect to the wishes of the deceased.

It has been held that it is not absolutely necessary that the attesting witnesses should see that the testator signed his name, for it will suffice if they see him writing something on a testamentary paper, although they may not know what it was he wrote, provided the Court be satisfied that what he so wrote in their presence was his signature (*p*); but it will not suffice if nothing were written on the document in the presence of the witnesses, nor any observation made by the testator or any other person in the room (*q*).

Sufficient if witnesses see testator writing something on will.

When the act of writing is done by the testator, or by any other person in his behalf, in the presence of the witnesses, it becomes necessary to consider what will amount to a sufficient acknowledgment of his signature by the testator within the meaning of the Wills Act (*r*), and, of course, the Court must in every case be satisfied that

(*n*) *In the goods of Wilson*, L. R., 1 P. & D. 269; 36 L. J., P. & M. 1.

(*o*) *Griffith v. Griffith*, L. R., 2 P. & D. 300; 41 L. J., P. & M. 14. See also *In the goods of Sharman*, L. R., 1 P. & D. 661; 38 L. J., P. & M. 47; and, on the subject of the attestation of wills generally, Wms. on Exors. 8th ed. pp. 73—93.

(*p*) *Smith v. Smith*, L. R., 1 P.

& D. 143; 35 L. J., P. & M. 65 (*Gwillim v. Gwillim*, 3 S. & T. 200; 29 L. J., P. & M. 31, and *Lloyd v. Roberts*, 12 Moo. P. C. 158, cited, as to the presumption arising from the appearance of the document).

(*q*) *Ilott v. Genge*, 4 Moo. P. C. 265; *In the goods of Pearsons*, 33 L. J., P. & M. 177.

(*r*) 1 Vict. c. 26, s. 9,

1 Vict. c. 26,
s. 9.

Acknowledg-
ment of
signature by
testator.

What
amounts to.

the testator's signature was on the document that has been attested by the witnesses, before the witnesses subscribed their names.

Thus, it was held a sufficient acknowledgment where the testator, laying his hand on the document, merely observed that he had "left his property equally between his nephews and nieces," and made use of no other words to imply that the document was testamentary, but the witnesses, who were acquainted with his handwriting, noticed that his name had been written by himself in the *testimonium* clause before they subscribed their signatures (*s*).

And the same was held where a testator showed the witnesses a document written on a sheet of foolscap paper, saying "This is my will," and then requested them to attest it, and accordingly they subscribed their names on the fourth page, but did not see the signature of the testator, which was written on the third page (*t*); but it is now settled law that the witnesses must, at the time of the acknowledgment, either see or at least have the opportunity of seeing the signature of the testator (*u*).

A testator may also sufficiently acknowledge his signature in the presence of the witnesses, although he takes no part whatever in the proceedings, but simply remains in the room as a passive spectator; as, where the will was lying open on the table, headed in large characters with the words "This is the last will and testament of, &c.," and had a full and formal attestation clause, and a third person in the presence of the testator, who sat silently by, pointed to his signature, and asked the witnesses to subscribe their names underneath it (*x*).

(*s*) *In the goods of Claridge*, 39 L. T. 612.

(*t*) *In the goods of Janaway*, 44 L. J., P. & M. 6 (*Beckett v. Howe*, L. R. 2 P. & D. 1; 39 L. J., P. & M. 1, followed); *In the goods of Huckvale*, L. R., 1 P. & D. 375; 36 L. J., P. & M. 84; and *Gwillim v. Gwillim*, 3 S. & T. 200; 29 L. J.,

P. & M. 31; see also *In the goods of Holgate*, 1 S. & T. 261; 29 L. J., P. & M. 161.

(*u*) See *In the goods of Gunstan*, 7 P. D. 102; 51 L. J., P. D. & A. 36; 46 L. T. 641; 30 W. R. 505.

(*x*) *Inglesant v. Inglesant*, L. R., 3 P. & D. 172; 43 L. J., P. & M. 43; *Faulds v. Jackson*, 6 No. of Ca. Ecc.

Where A. requested B. to prepare a will for him by which B. was appointed sole executor, and when prepared it was signed by A. in the presence of B. and two other persons. B. then sent for C. and D., and in A.'s hearing requested them to attest A.'s signature, which they did, and A. thanked them for their trouble. The signature was held to have been duly acknowledged, and probate was granted (y).

1 Vict. c. 26, s. 9.

Acknowledgment of signature by testator.

What amounts to.

It was held by Lord Penzance that witnesses must in every case be aware that the document they are attesting is testamentary; therefore, it will not be a sufficient acknowledgment if the testator merely requests them to attest his signature to a paper, unless they are aware that such paper is testamentary, or something is said or done either by the testator, or some other person on his behalf, to acquaint them with the fact (z).

Witness must be aware that paper is testamentary.

But where a testatrix exhibited a codicil to her last will which was entirely in her own handwriting to one of the attesting witnesses, telling her she had something which

Suppl. 12, followed as an authority for the proposition that third person may act for the testator. And for a case where under very similar circumstances it was held that the facts did not amount to acknowledgment by the testator, see *Morritt v. Douglas*, L. R., 3 P. & D. 1; 42 L. J., P. & M. 10. In this case the following were cited in the argument as to how far knowledge of the contents would amount to acquiescence by a testator sitting silently by, and taking no part in the proceedings:—*In the goods of Summers*, 2 Robert. 295; *In the goods of Bosanquet*, *ibid.* 577; *In the goods of Jones*, Deane, Ecc. Rep. 3; *Middlehurst v. Johnson*, 30 L. J., P. & M. 14; *Cunliffe v. Cross*, 3 S. & T. 37; 32 L. J., P. & M. 68; *Hastelow*

v. Stobie, L. R., 1 P. & D. 64; *Goodacre v. Smith*, *ibid.* 350; 36 L. J., P. & M. 43; *Cleare v. Cleare*, L. R., 1 P. & D. 655; 38 L. J. P. & M. 81; *Atter v. Atkinson*, L. R. 1 P. & D. 665.

(y) *In the goods of Bishop*, 30 W. R. 567; 46 J. P. 392, following the above case of *Inglesant v. Inglesant*.

(z) *Pearson v. Pearson*, L. R., 2 P. & D. 451; 40 L. J., P. & M. 53. In giving judgment in this case Lord Penzance reviews the decisions in *In the goods of Thomson*, 4 No. of Ca. Ecc. 643; *Gwillim v. Gwillim*, 3 S. & T. 200; 29 L. J., P. & M. 31; *In the goods of Huckvale*, L. R., 1 P. & D. 375; 36 L. J., P. & M. 84; *Beckett v. Howe*, L. R., 2 P. & D. 1; 39 L. J., P. & M. 1; and *Ilott v. Genge*, 3 Curt. 172.

1 Vict. c. 26,
s. 9.

Acknowledg-
ment of
signature by
testator.

What
amounts to.

Daintree v.
Fasulo.
Judgment of
Butt, J.

required two witnesses; and subsequently, the second attesting witness having come into the room, they both signed, but the testatrix did not tell them it was a testamentary paper, nor did they know what sort of paper it was they had attested; nor did they recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed: it was held to have been a sufficient acknowledgment by the testatrix of her signature, and that the codicil was entitled to probate (a).

The following is from the judgment of Butt, J., in the above case (b):—"In the goods of Thompson, decided by Sir H. Jenner Fust in 1846, is an authority in favour of Mr. Inderwick's contention, as I read it; a direct authority, because there the signature of the testator had been affixed to the document before the attesting witness saw it, and there was no statement to that attesting witness as to the nature of the document or as to the testator's signature. All that was said was, 'sign the paper,' and it was held that the circumstances amounted to a virtual or constructive acknowledgment by the testator. In *Pearson v. Pearson*, Lord Penzance treats that decision as practically overruled by the Privy Council in *Ilott v. Genge*, in which Sir H. Jenner Fust repeats the same observation: 'The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute.' In that case there was an appeal to the Privy Council, and their lordships decided that, even assuming a will which was signed by the deceased before the witness had been called in, 'the mere circumstance of calling in the witnesses to sign, without giving them any explanation of the instrument they are asked to sign, does not amount to an acknowledgment of his signature by a testator. As the case of *Ilott v. Genge* was decided by a

(a) *Daintree v. Fasulo*, L. R., 13
P. D. 67; 57 L. J., P. 76; 58 L. T.
661,

(b) 13 P. D. at p. 70. Confirmed
on appeal, *ibid.* p. 102.

Court of Appeal, it has set aside any observations not in accordance with it made in *In the goods of Thompson*.¹

"I do not quite understand what is meant by that. I doubt whether there is any observation of Sir H. Jenner Fust in *In the goods of Thompson* which is inconsistent with the decision in *Ilott v. Genge*; but if there be, I cannot help thinking that Lord Penzance had lost sight of what was the leading feature in *Ilott v. Genge*, but which did not exist in *In the goods of Thompson*, viz., that the witnesses were not allowed to see the testator's signature, which was covered up. That made the whole difference between the two cases. Holding *Ilott v. Genge* to be good law—which, of course, I do—there is nothing in that case to affect the decision of Sir H. Jenner Fust. I do not agree with Lord Penzance that *In the goods of Thompson* was overruled by *Ilott v. Genge*, and I consider myself at liberty to act upon it."

1 Vict. c. 26, s. 9.

Acknowledgment of signature by testator.

What amounts to.

As to what will amount to that mutual presence of the witnesses and the testator which is required by the statute, Lord Penzance has observed: "An act can hardly be said to be done by one person in the presence of another, unless at the time each is aware of the presence of the other" (c).

Mutual presence of testator and witnesses. What amounts to.

In the case of *In the goods of Gunstan* (d), decided in the Court of Appeal in February, 1882, it was decided, following the case of *Hudson v. Parker* (e), and disapproving those of *Gwillim v. Gwillim* (f) and *Becket v. Howe* (g), that to constitute a sufficient signing or acknowledgment of signature within sect. 9 of the Wills Act, the witnesses must, at the time of the signing or acknowledgment, see, or have the opportunity of seeing, the signature of the testator; otherwise it is not material whether the signature be in fact there at the time of attestation, or

(c) *In the goods of Kellick*, 34 L. J., P. & M. 2.

(d) 7 P. D. 102; 51 L. J., P. D. & A. 36; 46 L. T. 641; 30 W. R. 505.

(e) 1 Robert. 14.

(f) 3 S. & T. 200; 29 L. J., P. & M. 31.

(g) L. R. 2 P. & D. 1; 39 L. J., P. & M. 1.

1 Vict. c. 26,
s. 9.

Mutual
presence of
testator and
witnesses.

What
amounts to.

Presumption
as to due
execution—
“*omnia ritè
esse acta.*”

whether the testator say that the paper to be attested is his will, or that his signature is inside the paper.

It is not necessary that the testator and the witnesses should be actually in the same room during the execution of the testamentary paper, provided they were in such a position that they could have seen one another, had they chosen to do so (*h*); but, if there be evidence that, although they were in such a position, they did not make the attempt, and, consequently, did not see each other, the execution will be invalid (*i*).

In arriving at its conclusions in the absence of direct evidence, the Court is in a great measure guided by the appearance of the document itself, and “the presumption *omnia ritè esse acta* applies, with more or less force according to the circumstances of each case” (*k*). As a general rule, where a testamentary paper appears on the face of it to have been duly attested, the presumption of due execution will arise.

The fact that the attestation clause is not altogether formal, will not alone be sufficient to rebut this presumption (*l*), nor, at any rate where the will has a full attestation clause, will the deficient recollection of witnesses (*m*), or even the actual contrary evidence of one of them, alone suffice to do so (*n*).

(*h*) *In the goods of Trimmell*, 11 Jur., N. S. 248.

(*i*) See *In the goods of Kellick*, 34 L. J., P. & M. 2. See also *Shires v. Glascock*, 2 Salk. 687; *Davy v. Smith*, 3 *ibid.* 395; *Casson v. Dade*, 1 Bro. C. C. 98; *Newton v. Clarke*, 2 Curt. 323; *Tribe v. Tribe*, 1 Robert. 775; *Clerk v. Ward*, 4 Bro. P. C. 71; *Right d. Cater v. Price*, 1 Doug. 241; *Doe d. Wright v. Manifold*, 1 M. & S. 294. See also Wms. on Exors. 8th ed. pp. 87—89. And see *Jenner v. Finch*, L. R., 5 P. D. 106.

(*k*) *Per Lord Penzance, Vinni-*

combe v. Butler, 3 S. & T. at p. 582; 34 L. J., P. & M. 18.

(*l*) *In the goods of Rees*, 34 L. J., P. & M. 56.

(*m*) *In the goods of Holgate*, 1 S. & T. 261; 29 L. J., P. & M. 161; 5 Jur., N. S. 251; 7 W. R. 19; *Vinnicombe v. Butler*, 3 S. & T. 580; 34 L. J., P. & M. 18; *In the goods of Rees*, *ante*.

(*n*) *Wright v. Rogers*, L. R., 1 P. & D. 678; 38 L. J., P. & M. 67; 21 L. T. 156; 17 W. R. 833. See also, as to presumption of due execution, *Burgoyne v. Showler*, 1

In the recent case of *Wright v. Sanderson* (o), the testator wrote a holograph codicil upon the same paper as a will which he had made some ten years previously, and wrote at the end of it an attestation clause, adapting that at the end of the will to the case of a codicil, and called a nurse and a governess to "sign this paper," and they both did so. At the trial, some four years afterwards, the codicil was produced, bearing the signature of the testator, and the two attesting witnesses, both of whom were examined. Neither of them could say what writing was on the paper, nor whether the testator's signature was there when they signed, and both said they did not see him sign; and it further appeared that the governess had purposely refrained from looking at the writing on the paper, and the nurse had been very nervous. The Court held that as the codicil appeared to be properly executed, and the presumption *omnia ritè esse acta* was strengthened by the conduct of the testator, which showed an anxious and intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses, who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect.

But on the other hand this presumption may be rebutted (1) by the surrounding circumstances of the case; as where

1 Vict. c. 26, s. 9.

Presumption as to due execution—
"omnia ritè esse acta."

Presumption of due execution.

Robert. 9; *In the goods of Johnson*, 2 Curt. 341; *In the goods of Mustow*, 4 No. of Ca. Ecc. 289; *Cregreen v. Willoughby*, 6 Jur., N. S. 590; *In the goods of Frere*, 8 Jur. 494; *In the goods of Thomas*, 1 S. & T. 255; 28 L. J., P. & M. 33; *Trott v. Skidmore*, 2 S. & T. 12; 29 L. J., P. & M. 156; 6 Jur., N. S. 760; 8 W. R. 590; *Myers v. Gibson*, 14 W. R. 901; and will pronounced for by consent, *In the goods of Nicks*, 34 L. J., P. & M. 30; and *In the goods of Hux*,

46 L. J., P. & M. 39; 35 L. T. 909; 25 W. R. 273. See also *Doe d. Stutsbury v. Smith*, 1 Esp. 391, Kenyon; *Doe d. Spilsbury v. Burdett*, 4 A. & E. 1; 6 N. & M. 259; and, as to presumption of due execution from place of custody, *Orange v. Pickford*, 27 L. J., Ch. 808; 3 Drew. 463; 4 Jur., N. S. 649.

(o) 9 P. D. 149; 53 L. J., P. D. & A. 49; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180.

1 Vict. c. 26,
s. 9.

Presumption
as to due
execution—
“*omnia ritè
esse acta.*”

a will had no formal attestation clause, and the witnesses merely remembered that the paper was produced to them and they were asked to sign it, but there was no evidence to show whether the testator's name was on the paper at the time they so signed it or not (*p*): or (2) by direct evidence; as where the attesting witnesses to a will, appearing on the face of it to have been duly executed, swore positively that the testator had neither signed nor acknowledged it in their presence, and that when each of them signed, the other was not present (*q*).

And where a will appeared on the face of it to have been duly executed, and the attestation clause was in full accordance with the statute, the Court, nevertheless, gave effect to the parol evidence of the attesting witnesses, varying the terms of the attestation clause they had subscribed to; and held that the presumption of law, *omnia præsumuntur ritè et solenniter esse acta*, was rebutted by their evidence, and that the will had not been duly executed (*r*).

Will written
on several
sheets.

“No provision is contained in the Act as to wills written on several sheets. And, therefore, the decisions on the Statute of Frauds appear to be authorities; and they have established that if a will be written on several, or even separate, sheets, and the last alone be attested, the whole will is well executed, provided the whole be in the room, and although a part may not have been seen by the witnesses; and that it is a question for a jury whether all the papers constituting the will were in

(*p*) *Fischer v. Popham*, L. R., 3 P. & D. 246; 44 L. J., P. & M. 47. See also *In the goods of Swinford*, L. R., 1 P. & D. 630; 38 L. J., P. & M. 38.

(*q*) *Croft v. Croft*, 34 L. J., P. & M. 44. In the course of his judgment Lord Penzance distinguished this case from *Owen v. Williams*, 32

L. J., P. & M. 159; *Lloyd and Hart v. Roberts*, 12 Moo. P. C. 158, and *Gwillim v. Gwillim*, 3 S. & T. 200; 29 L. J., P. & M. 31, in all of which there was contradictory evidence.

(*r*) *Glover v. Smith*, 57 L. T. 60; 50 J. P. 456.

the room ; and further that the presumption is in the affirmative" (s). 1 Vict. c. 26,
s. 11.

By sect. 11 of the Wills Act (1 Vict. c. 26), it is enacted as follows:—

"Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Soldiers' and
mariners'
wills ex-
cepted.

And sect. 23 of the Statute of Frauds (29 Car. 2, c. 3), is couched in almost exactly similar language.

Subject, therefore, to the provisions of the Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72) (t), which applies only to inferior officers and ordinary seamen, and was passed to prevent the numerous frauds to which seamen are peculiarly liable, almost any document, clearly testamentary, however executed, emanating from a soldier in actual military service, or seaman at sea, comes within the exception, and is entitled to probate.

The terms, "soldier" and "mariner or seaman," include all members of these professions, from the highest to the lowest (x).

The word *soldier* includes soldiers who were in the service of the East India Company (y), even non-combatant officers, as surgeons in the East India Company's service (z) ; and the party, even though a minor, has the

(s) Wms. on Exors. 8th ed. p. 98, n. (l). And see *Bond v. Seawell*, 3 Burr. 1773; *Gregory v. The Queen's Proctor*, 4 No. of Ca. Ecc. 620; *Marsh v. Marsh*, 1 S. & T. 528; 30 L. J., P. & M. 77; *Ewen v. Franklin*, Dea. 7, followed in *Phipps v. Hale*, L. R., 3 P. & D. 166; *In the goods of Hammond*, 3 S. & T. 90; 32 L. J., P. & M. 200; *In the goods of Cat-trall*, 3 S. & T. 419; *In the goods of Morris*, 28 L. T. 745; *In the*

goods of Stoakes, 31 L. T. 552; 23 W. R. 62; and *Rees v. Rees*, L. R., 3 P. & D. 84.

(t) *Post*, Appendix.

(x) *Earl of Euston v. Lord Henry Seymour*, 21 July, 1802, cited 3 Curt. 339.

(y) *Re Prendergast*, 5 No. of Ca. Ecc. 92.

(z) *In the goods of Donaldson*, 2 Curt. 386.

Minor. power of making a will, if he be within the words of this section (a).

“Mariner or seamen.” The words *mariner* or *seamen* include seamen in the merchant service: at least, similar words in the Statute of Frauds were held to include them; for the Court granted administration with a nuncupative will annexed (as contained in an affidavit of three witnesses), holding that the 29 Car. 2, c. 3, s. 23, applied to merchant seamen (b).

Purser. A purser in a man-of-war comes within the description (c).

“Actual military service.” What constitutes “actual military service” was fully discussed in *Drummond v. Parish*, and it was decided that the words, as respects the British soldier, are confined to those who are *on an expedition*: where, therefore, Major-General Drummond died at Woolwich, 1843, and at the time of his death was an officer holding a commission in her Majesty’s army, filling the office of Director-General of the Royal Artillery, and on full pay, he was held not to be in “actual military service” (d).

Similarly, the will of a soldier made when quartered in New Brunswick, and who died there, was not admitted to probate; he being held not to be at the time “in actual military service” (e).

Sir H. J. Fust seemed to doubt that “our regiments in the colonies or in garrison at home are in actual military service;” this was in 1839, in time of peace (f).

But where a surgeon in the East India Company’s service, whilst on board ship on his way out to join his regiment in India, wrote out his will, and died after arriving in Calcutta, he was held to be in “actual military service” when the will was written (g).

(a) *In the goods of Farquhar*, 4 No. of Ca. Ecc. 651; *In the goods of McMurdo*, L. R., 1 P. & D. 540; 37 L. J., P. & M. 14.

(b) *Morell v. Morell*, 1 Hag. 51.

(c) *In re Hayes*, 2 Curt. 338.

(d) *Drummond v. Parish*, 3 Curt. 522.

(e) *White v. Repton*, 3 Curt. 818.

(f) *In the goods of Phipps*, 2 Curt. 368.

(g) *In the goods of Donaldson*, 2 Curt. 386.

So where an officer went with his regiment to Africa, for the purpose of joining a military expedition into the interior; before the expedition left the British settlement for the interior he signed a testamentary paper; the Court held that the testator was on actual military service at the time when the paper was signed (*h*).

1 Vict. c. 26,
s. 11.
Soldiers and
seamen on
actual service.

When a surgeon in the navy was invalided when on foreign service, and on his voyage home in a passenger ship, after being so invalided, he wrote a letter signed by him, but not in the presence of two witnesses, giving directions as to the disposition of his personal estate after his death, and died before reaching England; it was held, that the letter was entitled to probate, as the will of a mariner or seaman being at sea (*i*).

“Being at
sea.”

A mate, whilst on board her Majesty's ship *Excellent*, which was permanently stationed in Portsmouth Harbour, and when under age, executed a will, of which probate was granted to one of the executors named in it; on an application to revoke the probate, the Court held that the deceased came under the exception contained in the statute as a seaman at sea; and, although a minor at the time, that he had legally executed a will (*k*).

Minor “being
at sea.”

Where a seaman went on shore and there died by an accident, his will was allowed to pass as that of a “seaman being at sea” (*l*).

Seaman dying
while tempo-
rarily on
shore.

A letter written by a merchant seaman in the *Margate Roads* was admitted to probate under this section (*m*).

So also where the master and part owner of a trading vessel arrived at Port Adelaide, whence he wrote and forwarded by post a letter, some sentences of which were testamentary; it was held that he was a mariner at sea,

(*h*) *In the goods of Thorne*, 34 L. J., P. & M. 131. M. 14.

(*i*) *In the goods of Saunders*, L. R., 1 P. & D. 16; 35 L. J., P. & M. 26. (*l*) *In re Lay*, 2 Curt. 375. See also *Lord Seymour's case*, cited 2 Curt. 375.

(*k*) *In the goods of McMurdo*, L. R., 1 P. & D. 540; 37 L. J., P. & M. 108. (*m*) *In re Milligan*, 2 Robert.

1 Vict. c. 26, s. 11. and consequently that such a letter, being in his handwriting and testamentary, was entitled to probate (*n*).

Soldier on actual military service.

And where the will of a soldier made during actual military service contains material alterations, the presumption is that such alterations were made during the continuance of such military service (*o*).

Alterations, &c., by.

In giving judgment in this case Sir James Hannen says: "A somewhat similar question has arisen in reference to non-attested alterations in a will dated before the Wills Act came into operation. *In the goods of Streaker* (*p*), Sir C. Cresswell held, on the authority of *Pechell v. Jenkinson* (*q*), and *In the goods of Pennington* (*r*), that the presumption is, in the absence of circumstances from which the contrary may be inferred, that the alterations were made before the Act came into operation. I think that an analogous principle is applicable to the present case, and that it is to be presumed that the alterations in the will were made while the testator was still engaged in actual military service" (*s*).

(*n*) *In the goods of Parker*, 2 S. & T. 375; 28 L. J., P. & M. 91. See also *Herbert v. Herbert*, Deane's Ecc. Rep. 11; *In the goods of Corby*, 1 Ecc. & Adm. 292; *In the goods of Austen*, 2 Robert. 611.

(*o*) *In the goods of Tweedale*, L. R., 3 P. & D. 204; 44 L. J., P. & M. 35.

(*p*) 28 L. J., P. & M. 50.

(*q*) 2 Curt. 273.

(*r*) 1 No. of Cas. 399.

(*s*) 3 P. & D. at p. 206.

CHAPTER VIII.

HOW A WILL MAY BE REVOKED, AND HOW IT MAY BE
REVIVED AFTER REVOCATION.

THE sections of the Wills Act regulating the revocation of wills since January 1st, 1838, are sects. 18, 19, 20, and 21 (a). 1 Vict. c. 26,
s. 18.

Sect. 18 provides, "that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment), when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions." Will, revocation by marriage.

By sect. 19, "No will shall be revoked by any presumption of intention, on the ground of an alteration in circumstances." Sect. 19.
Presumption of intention.

By sect. 20, "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same;" and these are now the only methods by which a will can be revoked. Sect. 20.
Revocation by will or codicil, or other writing; burning, tearing, or otherwise destroying.

To revoke a will by marriage, the marriage must be

(a) For the law on this subject as it existed previous to Jan. 1st, 1838, see Wms. on Exors., 9th ed. pp. 107—168, and Powles's Browne on Probate, pp. 82—85.

1 Vict. c. 26,
s. 18.

By marriage.

Must be valid
by law of
England.

Indian
divorce.
Marriage too
soon after
decree abso-
lute.

Will made
under power,
when not
revoked by.

valid by the laws of this country, and there is no distinction in this respect between a natural-born and a naturalized British subject (*b*).

But marriage will not operate to revoke a will if the testator be, at the time of his marriage, domiciled in a country where marriage has not that effect; neither will a subsequent change of domicile affect his position (*c*).

A respondent and a co-respondent in a divorce suit in India, in which a decree absolute was pronounced on the 27th November, 1879—but which, by the Indian Divorce Act, would not come into force till six months afterwards—came to England, and were married on 3rd February, 1880. On February 6th, the co-respondent duly executed a will by which he bequeathed all his property to his “reputed wife,” and, on 2nd April, the parties went through a second form of marriage: it was held, that the first marriage, having been within six months from the date of the final decree of divorce, was invalid, and that the will was revoked by the subsequent marriage (*d*).

And a will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when, in the event of certain contingencies happening, the property thereby appointed will not, in default of appointment, pass to the persons who would have taken in case of intestacy under the Statute of Distributions (*e*).

(*b*) *Mette v. Mette*, 1 S. & T. 416; 28 L. J., P. & M. 117; see also *Brook v. Brook*, 1 W. Bl. 258; *Warrender v. Warrender*, 2 Cl. & Fin. 488.

(*c*) *In the goods of Reid*, L. R., 1 P. & D. 74; 35 L. J., P. & M. 43; semble, that this is due to the operation of 24 & 25 Vict. c. 114 (*post*, Ch. XV.). Previously to that Act the validity of a will had to be determined by the law of the testator’s domicile at the time of his decease.

(*d*) *Warter v. Warter*, 15 P. D. 152; 59 L. J., P. D. & A. 87; 63 L. T. 250; 54 J. P. 631.

(*e*) See *In the goods of Fenwick*, L. R., 1 P. & D. 319; 36 L. J., P. & M. 54; *In the goods of McVicar*, L. R., 1 P. & D. 671; 38 L. J., P. & M. 84; see also *Elmsley v. Young*, 2 My. & K. 780; *In the goods of Mason*, 30 L. J., P. & M. 168; *In the goods of Worthington*, 25 L. T. 853; 20 W. R. 260; *In the goods of Fitzroy*, 1 S. & T. 133.

A testator by his will bequeathed all the real and personal estate to which he might be entitled at his death, or over which he had power of appointment, to a woman, whom he appointed his sole executrix, and whom he subsequently married, and died without making another will: the property over which he had power of appointment under the will of his mother, if he had not exercised it, would have been divided among his brothers and sisters: held, that so much of the will as was in execution of the power of appointment came within the exception of sect. 18 of the Wills Act, and was not revoked by marriage, and that administration with the will annexed might be granted to the widow limited to the property over which the testator had a power of appointment (*f*).

“It may be stated generally, as a canon of construction, that a clear gift cannot be cut down by any other words, unless they show an equally clear intention” (*g*).

It follows, therefore, that the execution of a subsequent testamentary paper does not necessarily revoke a previous will, unless it contain words to that effect. The general rule in interpreting a will and codicil is, that the old will will take effect as far as it is not inconsistent with the codicil (*h*), and if a subsequent testamentary paper is only partly inconsistent with one of earlier date, the earlier instrument is only revoked as to those parts as to which it is inconsistent, and both papers must be admitted to probate, as together containing the last will of the deceased (*i*),

1 Vict. c. 26,
s. 18.
Will made
under power.

Sect. 20.
By another
will or codicil.

(*f*) *In the goods of Russell*, 15 P. D. 111; 59 L. J., P. D. & A. 80; 62 L. T. 644.

(*g*) *Wms. on Exors.*, 9th ed. p. 156 (citing *Kiver v. Oldfield*, 4 De G. & J. 30).

(*h*) *Robertson v. Powell*, 2 H. & C. 762; 33 L. J., Ex. 34; 10 Jur., N. S. 442; 12 W. R. 623; *Doe d. Evans v. Ward*, 21 L. J., Q. B. 145; 18 Q. B. 197; 16 Jur. 709;

Darley v. Martin, 22 L. J., C. B. 683; 22 L. J., C. P. 249; 17 Jur. 1125.

(*i*) *In the goods of Joys*, 30 L. J., P. & M. 169; *Rogers v. Good-enough*, 2 S. & T. 342; 31 L. J., P. & M. 49; 8 Jur., N. S. 391; *In the goods of Graham*, 3 S. & T. 69; 32 L. J., P. & M. 113; *Greaves v. Price*, 3 S. & T. 71; 32 L. J., P. & M. 113; 11 W. R. 809; *In*

1 Vict. c. 26,
s. 20.

By another
will, codicil,
or other
writing.

Words "last
will," effect
of.

after which the documents come under the jurisdiction of the Court of Construction, whose function it is to explain the effect of them.

It was held by Sir H. J. Fust, that if a testator executed a paper purporting to be "*his last will*," and in which executors were appointed, although it might dispose of a portion only of his personal estate, and did not expressly revoke a former testamentary paper, that the former was nevertheless revoked by the latter, the words "*last will*" being in his opinion, conclusive, in spite of the fact that the two documents might not be wholly inconsistent (*k*).

the goods of Whatman, 34 L. J., P. & M. 17; 10 Jur., N. S. 1242; *In the goods of Steele*, L. R., 1 P. & D. 575; *In the goods of Baily*, L. R., 1 P. & D. 628; 20 L. T. 278; 17 W. R. 401 (where Lord Penzance remarked that the decisions *In the goods of Leese*, 2 S. & T. 442; 31 L. J., P. & M. 169; 5 L. T. 848; and *In the goods of Morgan*, L. R., 1 P. & D. 323; 36 L. J., P. & M. 64; 16 L. T. 181, seemed inconsistent with *In the goods of Lowe*, 3 S. & T. 478; 33 L. J., P. & M. 155); *In the goods of Howard*, L. R., 1 P. & D. 636; 38 L. J., P. & M. 32; *In the goods of De la Saussaye*, L. R., 3 P. & D. 42; 42 L. J., P. & M. 47 (citing *Crosbie v. McDoual*, 4 Ves. 210); *In the goods of Ince*, L. R., 2 P. D. 111; 46 L. J., P. & M. 30; 25 W. R. 396; *In the goods of Coode*, L. R., 1 P. & D. 449; 36 L. J., P. & M. 129; 16 L. T. 746; *In the goods of Lord Howden*, 43 L. J., P. & M. 26; 30 L. T. 768; 22 W. R. 711; *In the goods of Harris*, L. R., 2 P. & D. 83; 39 L. J., P. & M. 48; *In the goods of*

Fenwick, L. R., 1 P. & D. 319; 36 L. J., P. & M. 54; 16 L. T. 124; *In the goods of Griffith*, L. R., 2 P. & D. 457; 26 L. T. 780; 20 W. R. 495; *In the goods of Donaldson*, L. R., 3 P. & D. 45; 42 L. J., P. & M. 19; 21 W. R. 549; 28 L. T. 477; *In the goods of Reynolds*, L. R., 3 P. & D. 35; 42 L. J., P. & M. 20; 28 L. T. 144; 21 W. R. 512; *In the goods of Andrew*, 42 L. J., P. & M. 38; 28 L. T. 238; 21 W. R. 329; *In the goods of Bangham*, 1 P. D. 429; 45 L. J., P. & M. 80; 24 W. R. 712 (citing *In the goods of Cooper*, Deane, 9); *Robinson v. Clarke*, L. R., 2 P. D. 269; *In the goods of Rawlings*, 41 L. T. 559; see also *Farrer v. St. Cath's. Col., Cam.*, L. R., 16 Eq. 19; 42 L. J., Ch. 809; 28 L. T. 800; 21 W. R. 643; *Burton v. Newbery*, L. R., 1 C. D. 235; 45 L. J., Ch. 202; 34 L. T. 15; *Bridges v. Strachan*, L. R., 8 C. D. 558; 38 L. T. 502; 26 W. R. 691; *Green v. Tribe*, 9 L. R., C. D. 231; 47 L. J., Ch. 783; 38 L. T. 914; 27 W. R. 39.

(*k*) *Plenty v. West*, 1 Robert. 264.

And this decision was subsequently, after much consideration, recognized and acted upon by Sir John Dodson (*l*), whose judgment was, however, reversed on appeal by the Judicial Committee of the Privy Council (*m*).

1 Vict. c. 26, s. 20.

By another will, codicil, or other writing.

Lemage v. Goodban, per Lord Penzance.

What is now the law on this point has been very clearly and simply laid down by Lord Penzance in the case of *Lemage v. Goodban* (*n*). His lordship says (*o*), "The case of *Plenty v. West* (*p*), so far as it supports the doctrine, that the use of the words 'last will' in a testamentary paper, necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto v. Gilbert* (*q*), and *Stoddart v. Grant* (*r*). . . . Cases of the present character are properly questions of construction, and in deciding on the effect of a subsequent will on former dispositions, this Court has to exercise the functions of a Court of Construction. The principle applicable is well expressed in Mr. Justice Williams' book on Executors (*s*). He says, 'The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinborne says above, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only where they are inconsistent.' This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary

Words "last will," effect of.

(*l*) *Cutto v. Gilbert*, 18 Jur. 560.

(*p*) 1 Robert. 264.

(*m*) 9 Moo. P. C. 131; and see

(*q*) 9 Moo. P. C. 131.

Wms. on Exors. 9th ed. p. 143 *et seq.*

(*r*) 1 Macq. 171.

(*n*) L. R., 1 P. & D. 57.

(*s*) Wms. on Exors. 9th ed. pp.

(*o*) *Ibid.* at p. 61.

139, 140.

1 Vict. c. 26,
s. 20.

By another
will, codicil,
or other
writing.

*In the goods of
Petchell,
per Lord
Hannen.*

Later will not
forthcoming,
no evidence
as to contents
of.

intentions, so far as they are manifested in writing duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document."

And Sir James Hannen, in a more recent case (t), said, "I must say that if I could have dealt with the question uninfluenced by the later decisions, I should have been disposed to adopt the views of Sir H. J. Fust in *Plenty v. West* (u), that in order that two wills should be entitled to probate there must be something in the second indicating an intention on the part of the testator that the two instruments should be construed conjointly. But the later decisions are otherwise, and the principle of them must be taken to be correctly expressed in *Williams on Executors*" (v). His lordship then proceeded to read the passage above cited, and continued, "The law thus laid down was acted upon by my predecessor, Lord Penzance, in *Lemage v. Goodban*."

A testator made a will in 1864 appointing his wife sole executrix, and duly executed another document in 1877, of the contents of which there was no evidence, except that after its execution the testator said:—"I have made a will altering my affairs, and I have taken care of Ellen, and there will be something for Roby," and except a memorandum at the foot of the will as follows:—"This will is now useless, a new will having been made in October, 1877, upon my wife telling me she was sorry she had ever seen me," &c.; it was held that, in the absence of proof of an alteration as to the executrix, or of a revocatory clause or disposition wholly inconsistent with the first will, that will was not revoked, and was therefore entitled to probate (x).

(t) *In the goods of Petchell*, L. R.,
3 P. & D. at p. 156.

(u) 1 Robert. 264.

(v) 9th ed. pp. 139, 140.

(x) *Hellier v. Hellier and others*,
9 P. D. 237; 53 L. J., P. D. & A.
105; 33 W. R. 324; 49 J. P. 8.

Whenever the revocation of a testamentary document is in dispute, the Court must decide upon the particular circumstances of each case; and if the devise in a will is clear, it is incumbent on the party who contends it is not to take effect, by reason of a revocation in a subsequent testamentary paper, to show an intention to revoke equally clear with the original intention to devise (*y*).

1 Vict. c. 26, s. 20.

By another will, codicil, or other writing. Burden of proof.

And it would seem to follow, from the decision of Sir James Hannen in *Gould v. Lakes* (*z*), that the declarations of the testator, both before and after the execution of such testamentary paper, would now be admissible in evidence to show the intention with which such paper was executed.

Declarations of testator.

As a general rule, where a testamentary paper "contains a general revocatory clause, it operates as a revocation of all prior testamentary acts. But . . . probate may be granted of a paper of a date prior to such" testamentary paper, "provided the Court is satisfied that it was not the intention of the deceased to revoke the particular legacy which is the subject of such paper" (*a*).

General revocatory clause.

A fortiori, a subsequent testamentary paper may revoke a prior disposition or dispositions by express words; but "even an express revocation of all former wills, though not wanting in any circumstance for a revocation, will not operate as such, if only subservient to another subsequent disposition, which fails" (*b*).

By express words.

As has been already seen, a subsequent testamentary

(*y*) *Robertson v. Powell*, 2 H. & C. 762; 33 L. J., Ex. 34; 10 Jur., N. S. 442; 12 W. R. 623; and see Wms. on Exors. 9th ed. 156.

(*z*) 49 L. J., P. & M. at p. 62 (following *Sugden v. St. Leonards*, 1 P. D. 154; 45 L. J., P. & M. 49); and see *Jenner v. Finch*, 5 P. D. 106; 49 L. J., P. D. & A. 25; 42 L. T. 327; 28 W. R. 520.

(*a*) Wms. on Exors. 9th ed. pp. 156, 157; and see *In the goods of Eustace*, L. R., 3 P. & D. 183;

43 L. J., P. & M. 46; 30 L. T. 909; 22 W. R. 832; *In the goods of Merritt*, 1 S. & T. 112; 4 Jur., N. S. 1192; *In the goods of Hastings*, 26 L. T. 715; 20 W. R. 616; Wms. on Exors. 8th ed. p. 189. "By Sir W. Grant, 7 Ves. 379; unless it fails by reason of the incapacity of the legatee; *Tupper v. Tupper*, 1 Kay & J. 665."

(*b*) *Per* Sir W. Grant, 7 Ves. 379. See Wms. on Exors. 9th ed. p. 156.

1 Vict. c. 26,
s. 20.

By another
will, codicil,
or other
writing.

Without ex-
press words.
Inconsistent
wills.

Later will not
forthcoming.

Evidence as
to contents.

“Or by some
writing.”

paper may “*in effect*,” without express words, entirely revoke a former one; as where a testator, by a subsequent testamentary paper, disposes of the whole of his property, such testamentary paper will act as a revocation of a will disposing of part only (*c*).

And two testamentary documents may be wholly inconsistent with each other, and incapable of standing together, in which case the latter will entirely revoke the former (*d*), though “if two inconsistent wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the deceased must be considered intestate. But in every case the Courts will struggle to reconcile them, if possible, and collect some consistent disposition from the whole” (*e*).

A will may also be revoked by a testamentary document of later date, not forthcoming, if there be evidence that such document has been in existence and duly executed, and contained a clause of revocation of former wills (*f*).

The 20th section of the Wills Act further provides that a testamentary paper may be revoked “*by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed.*”

There would appear to be some doubt whether a writing of this description, at least, if it neither contain dispositive

(*c*) *Henfrey v. Henfrey*, 1 Macq. 271 (cited by Lord Penzance in *Lemage v. Goodban*, L. R., 1 P. & D. at p. 62); and see *Morehouse v. Lord*, 32 L. J., Ch. 295.

(*d*) *Cottrell v. Cottrell*, L. R., 2 P. & D. 397; 41 L. J., P. & M. 57; 26 L. T. 527; 20 W. R. 590; and see *In the goods of Good-enough*, 2 S. & T. 141; 30 L. J., P. & M. 166.

(*e*) Wms. on Exors. 9th ed. p. 146.

(*f*) *Wood v. Wood*, L. R., 1 P. & D. 309; 36 L. J., P. & M. 34; *Johnson v. Lyford*, L. R., 1 P. & D. 546; 37 L. J., P. & M. 65; 18 L. T. 769; 16 W. R. 1130; and see *In the goods of Gray*, 39 L. J., P. & M. 42; *Keen v. Keen*, L. R., 3 P. & D. 105; 42 L. J., P. & M. 61; 29 L. T. 247; and *Sugden v. St. Leonards*, 1 P. D. 154; 45 L. J., P. & M. 49; 34 L. T. 372; 24 W. R. 479; *Berthon v. Berthon*, 18 L. T. 301; 16 W. R. 673.

words nor appoint an executor, but be merely a memorandum showing an intention to revoke, ought to be admitted to probate, and the Court will probably order administration of the goods of the deceased, as intestate, with such writing or memorandum annexed (g).

1 Vict. c. 26, s. 20.

By another will, codicil or other writing.

But it would seem it is otherwise if the deceased in such writing express a wish in what way his or her property should go, as where the "*writing*" contained these words: "I am desirous to revoke and make void my said will and disposition aforesaid, and to die intestate, *in order that all my property, both real and personal, may go and devolve upon my heirs and next of kin* the same as if I had made no will, and had died utterly intestate" (h).

"Or by some writing," meaning of words.

It would appear that a married woman, even though incompetent to make a will, may execute a writing of this description (i).

In the Statute of Frauds, the words "*cancelling*" and "*obliterating*" occur. These words are omitted from the 20th section of the Wills Act, and the words "*otherwise destroying*" are substituted for them. "It has been considered that these words mean modes of destruction *ejusdem generis*, as cutting, throwing into water, or the like, and therefore exclude cancelling" (k); and this seems the

Revocation by tearing, burning, or otherwise destroying.

(g) See Wms. on Exors. 9th ed. p. 110, n. (l); see also *In the goods of Hubbard*, L. R., 1 P. & D. 53; 35 L. J., P. & M. 27; *In the goods of Hicks*, L. R., 1 P. & D. 683; *In the goods of Fraser*, L. R., 2 P. & D. 40; 39 L. J., P. & M. 20; see also *In the goods of Brewster*, 29 L. J., P. & M. 69; 6 Jur., N. S. 56; *In the goods of Durance*, L. R., 2 P. & D. 406; 41 L. J., P. & M. 60; 26 L. T. 983; 20 W. R. 759; *Fischer v. Popham*, 3 L. R., P. & D. 246; 44 L. J., P. & M. 47; 33 L. T. 231; 23 W. R. 683; *In the goods of Gentry*, L. R., 3 P. & D. 80; 42 L. J., P. & M. 49; 28 L.

T. 480; 21 W. R. 888.

(h) *Brenchley v. Still*, 2 Robert. 162 (cited by Lord Penzance, *In the goods of Hicks*, L. R., 1 P. & D. at p. 684).

(i) *Hawkesley v. Barrow*, L. R., 1 P. & D. 147; 35 L. J., P. & M. 67.

(k) Wms. on Exors. 9th ed. p. 115, and *ib.* note (w); Sugden's Essay, p. 46; *Stephens v. Taprell*, 2 Curt. 458; *In the goods of Rose*, 4 No. of Cas. Ecc. 101; *In the goods of De Bode*, 5 No. of Cas. Ecc. 189, 191; *In the goods of Brewster*, 29 L. J., P. & M. 69; *Lushington v. Onslow*, 6 No. of Cas. Ecc. 183; see also *Cheese v. Lovejoy*, 2 P. D. 251.

1 Vict. c. 26,
s. 20.
By tearing,
burning, or
otherwise
destroying.
Doe v. Harris,
per Sir
H. J. Fust.

Material por-
tion of will
must be
destroyed.
Act must be
done *animo*
revocandi.

natural inference from the provisions as to obliterations and alterations, already considered.

The following dicta from the case of *Doe v. Harris* (*m*), decided under the Statute of Frauds, but subsequently cited and adopted by Sir H. J. Fust, as applicable to the 20th section of the Wills Act (*n*), are cited in Williams on Executors (*o*). Lord Denman said: "There must be, at all events, a partial burning of the instrument itself. I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the will is." Williams, J., said: "The will must be torn or burnt, and the question will always be, whether that was done with intention to cancel; how much should be burnt, or whether the will should be torn into more or fewer pieces, it is not necessary to lay down." Coleridge, J., said, "The question is put—Whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say, that there must be such an injury with intent to revoke, as destroys the entirety of the will: because it may then be said that the instrument no longer exists as it was."

These dicta have since been followed in a variety of cases, and the result of the authorities appears to be, that, in order to effect the revocation of a will by "tearing, burning, &c.," (1) some material portion or portions of the will—as, *e.g.*, the signature of the testator or attesting witnesses—must be torn off or destroyed; (2) the act or acts must be done *animo revocandi*; and (3) the testator must have completed the act or acts he intended to do for the purpose of revocation (*p*); and, as it is competent to a tes-

(<i>m</i>) 6 A. & E. 209; S. C., 2 Nev. & P. 615.	Jur., N. S. 35; <i>In the goods of Lewis</i> , 1 S. & T. 31; 27 L. J., P. & M. 31; <i>In the goods of Gullan</i> , 1 S. & T. 23; 27 L. J., P. & M. 15; <i>Evans v. Dallow</i> , 31 L. J., P. & M. 128; <i>In the goods of Harris</i> , 3 S. & T. 485; 33 L. J., P. & M. 181; <i>Bell v. Fothergill and others</i> , L. R., 2 P. & D. 148 (citing <i>Davies</i>
(<i>n</i>) <i>Hobbs v. Knight</i> , 3 H. & N. 341.	
(<i>o</i>) 9th ed. p. 117.	
(<i>p</i>) <i>Price v. Powell</i> , 3 H. & N. 341; 27 L. J., Ex. 609; <i>Andrew v. Motley</i> , 12 C. B., N. S. 514; <i>Williams v. Tyley</i> , Johns. 529; 5	

tator, under the 20th section, to revoke a part only of his will in the manner described, it often becomes a question, whether acts of destruction done by him *animo revocandi*, have operated an entire or only a partial revocation of the instrument before the Court (*q*).

1 Vict. c. 26, s. 20.

By tearing, burning, or otherwise destroying.

But if the testator do not actually complete the act of destruction, whatever it may be, that he intended to perform for the purpose of revoking his will, whether it be that he changes his mind before the act is complete, or that he is prevented by any other cause from completing it (*r*), or if he perform the act of destruction without the necessary *animus revocandi*, as if he be labouring under a mental incapacity (*s*), the instrument will not be thereby revoked; for "all the destroying in the world, without intention, will not revoke a will, nor all the intention in the world, without destroying; there must be the two" (*t*).

Partial or complete revocation.

As where a man, having executed a codicil at the foot of his will, cut off his signature to the will; and upon proof that he thereby intended to revoke the will—it was held that he meant to revoke both will and codicil (*u*).

Signature cut off.

And where the testator had obliterated the whole of a

v. Davies, in marginal note, see 445); *In the goods of Slade*, 20 L. T. 330; *In the goods of Simpson*, 5 Jur., N. S. 1366; *Abraham v. Joseph*, *ibid.* 179; *Cheese v. Lovejoy*, 2 P. D. 251; 46 L. J., P. & M. 66; 37 L. T. 294; 25 W. R. 853.

(*q*) *In the goods of Lambert*, 1 No. of Cas. Ecc. 131; *In the goods of Cooke*, 5 No. of Cas. Ecc. 390; *In the goods of Jones*, 7 No. of Cas. Ecc. 106; *Clarke v. Scripps*, 2 Robert. 563; *In the goods of Woodward*, L. R., 2 P. & D. 206; 40 L. J., P. & M. 17; *Christmas v. Whinyates*, 32 L. J., P. & M. 73.

(*r*) *Doe d. Perkes v. Perkes*, 3 B. & A. 489 (and see accordingly *In the goods of Colberg*, 2 Curt. 832);

Elms v. Elms, 1 S. & T. 155; *In the goods of Eeles*, 32 L. J., P. & M. 4; *In the goods of Wheeler*, 42 L. T. 60; *Giles v. Warren*, L. R., 2 P. & D. 401; 41 L. J., P. & M. 59; *Clarkson v. Clarkson*, 2 S. & T. 497; *In the goods of Coleman*, 2 S. & T. 314 (by consent).

(*s*) *Harris v. Berrall*, 1 S. & T. 153; *Brunt v. Brunt*, L. R., 3 P. & D. 37 (where Sir James Hannen said the facts were exactly the same as in *Borlase v. Borlase*, 4 No. of Cas. Ecc. 106).

(*t*) *Per James*, L. J., *Cheese v. Lovejoy*, 2 P. D. at p. 253.

(*u*) *In the goods of Bleckley*, 8 P. D. 169; 52 L. J., P. D. & A. 102; 31 W. R. 171; 47 J. P. 663.

1 Vict. c. 26,
s. 20.

By tearing,
burning, or
otherwise
destroying.

Signature of
testator and
witnesses
scratched out
with knife.

codicil, including his signature, by thick black marks, and at the foot of it had written the words, signed by himself and attested by two witnesses, "We are witnesses to the erasure of the above;" the codicil was held to have been revoked (*v*).

Again, a will which, after execution, had remained in the custody of the deceased, and was found in her trunk with her own signature and the signatures of the attesting witnesses scratched out as with a knife, was held revoked (*x*).

A testator by his will appointed two executors with the usual directions as to payment of debts, &c., and also appointed the same persons trustees with directions to pay the income arising from his property to his wife and his only son in equal shares during her life or widowhood, and after her death or re-marriage the whole estate to go to the son absolutely. After his death the will was found with the clause appointing executors cut out of it, and there was evidence of declarations by the testator that he had cut it out with a pair of scissors with the intention of cutting out the name of one of the executors. The wife died in the lifetime of the testator, and the son was thus the only person entitled to the estate. It was held that the appointment of executors was revoked by the mutilation of the will; that the trustees were not executors according to the tenor, and that the son was entitled to a grant of administration with the will annexed (*y*).

A testator has no power to direct a third person to destroy his will, except *in his presence*, as provided by the statute (*z*); neither has he power to order a *post mortem* destruction of his will (*a*).

(*v*) *In the goods of Gosling*, 11 P. D. 79; 55 L. J., P. D. & A. 27; 34 W. R. 492; 50 J. P. 263.

(*x*) *In the goods of Morton*, 12 P. D. 141; 56 L. J., P. D. & A. 96; 57 L. T. 501; 35 W. R. 735; 51 J. P. 680.

(*y*) *In the goods of Maley*, 12 P.

D. 134; 56 L. J., P. D. & A. 112; 57 L. T. 500; 35 W. R. 764; 51 J. P. 423.

(*z*) See Wms. on Exors. 9th ed. p. 120; see also *In the goods of Dadds*, Dea. & Sw. 290.

(*a*) *Stockwell v. Ritherdon*, 6 No. of Cas. Ecc. 414.

Cutting out
clause ap-
pointing
executors.

Destruction
by third
person.

A testatrix, being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up and sent to her solicitor to be re-copied, but died before she could re-execute it. There being no *animus revocandi*, the codicil was admitted to probate (*b*).

1 Vict. c. 26, s. 20.

Direction to tear up without any *animus revocandi*.

So, also, where the will of a testatrix was destroyed in her presence, but without her consent or authority, by a relative, and subsequently, the testatrix, though pressed to do so, refused to make a new will, saying she could not bring her mind to do it: it was held that there was no sufficient evidence of a ratification of the destruction of the will so as to constitute it an act done by the direction and by the authority of the testatrix, and that probate might be granted of the will as contained in an affidavit of the executor (*c*).

Destruction by third person in presence of testatrix without authority.

By s. 21, "No obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of a will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will."

1 Vict. c. 26, s. 21.

Obliterations, interlineations, &c.

But where a testator, after duly executing his will, which was in five sheets, each of which was signed by himself, and initialled by the attesting witnesses, took out three sheets, and substituted three new ones, which were signed but not attested; and he neither altered the date of the will, nor

Will made in five sheets, three sheets substituted after execution.

(*b*) *In the goods of Thornton*, 14 P. D. 82; 58 L. J., P. D. & A. 82; 61 L. T. 200; 37 W. R. 624; 53 J. P. 407.

(*c*) *Mills v. Millward*, 15 P. D. 20; 59 L. J., P. D. & A. 23; 61 L. T. 651.

1 Vict. c. 26,
s. 21.

Obliterations,
interlineations,
&c.,
animus
revocandi.

Dependent
relative
revocation.

re-signed it, nor was it re-attested: it was held not entitled to probate (*g*).

Obliterations and alterations, in order to operate a revocation under this section, must have been made *animo revocandi*, and not merely in substitution; and further, in order to bring an unattested alteration or obliteration within the exception contained in the section, it must be so complete, that none of the parts obliterated can be distinguished upon the face of the will by the aid of magnifying glasses, or evidence of that nature (*h*), "not by extrinsic evidence" (*i*).

The principle that the effect of acts of obliteration, alteration, tearing, burning, and otherwise destroying, &c., "depends upon the mind (with which these acts are done), having been pursued in all its consequences, has introduced the doctrine of dependent relative revocations, in which the act of cancelling, &c., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not" (*k*).

So, if a testator does some act which, under ordinary circumstances, would amount to a revocation of a testamentary paper; intending to revoke it, not because he desires to die intestate, but because he is under the erroneous impression that by so doing he will validate and bring into force another testamentary document, which he either has, or imagines he has, executed (*l*); or is under

(*g*) *Treloar v. Lean and others*, 14 P. D. 49; 58 L. J., P. D. & A. 39; 60 L. T. 512; 37 W. R. 560.

(*h*) *Townley v. Watson*, 3 Curt. 761; *Short d. Gastrell v. Smith*, 4 East, 419; *In the goods of Bedford*, 5 No. of Cas. Ecc. 188; *Brooke v. Kent*, 3 Moore, P. C. 334; *In the goods of Harris*, 1 S. & T. 536; 29 L. J., P. & M. 79; *In the goods of McCabe*, L. R., 3 P. & D. 94; *In the goods of Horsford*, *Ibid.* 211. See

also Wms. on Exors. 9th ed. pp. 122—136.

(*i*) *Per* Sir James Hannen, *In the goods of McCabe*, L. R., 3 P. & D. at p. 96; and see *In the goods of James*, 7 Jur., N. S. 52.

(*k*) Wms. on Exors. 9th ed. p. 126.

(*l*) *Onions v. Tyrer*, 2 Vern. 742; *S. C.*, Prec. in Ch. 459; 1 Eq. Cas. Abr. 408; 1 P. Wms. 343; 1 Saund. 280 b, note to *Duppa v.*

the erroneous impression that the document to which he does the act has been already revoked, or is of no force, and therefore useless (*n*), the doctrine of dependent relative revocation will apply, and such testamentary paper will not thereby be revoked.

It makes no difference whether the erroneous impression operating on the mind of the testator be one of law or of fact (*n*). If "it is evident that a testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation" (*o*). "But where the second disposition fails for want of capacity in the legatee to take, it appears to be

1 Vict. c. 26, s. 21.

Dependent relative revocation.

Erroneous impression on testator's mind may be of law or fact.

Mayo; Burtenshaw v. Gilbert, Cowp. 52; *Perrott v. Perrott*, 14 East, 440; *Lord John Thynne v. Stanhope*, 1 Add. 53; *Hyde v. Hyde*, 1 Eq. Cas. Abr. 409; *S. C.*, 3 Ch. Rep. 155; *Hyde v. Mason*, Vin. Abr. (R. 2), pl. 17; *S. C.*, nomine *Limbery v. Mason*, Com. Rep. 451; *S. C.*, 3 Eq. Cas. Abr. 776; 4 Burr. 2515; cited by Lord Mansfield in *Goodright v. Glazier*; *S. C.*, nomine *Calamy v. Hyde*, 1 Cas. temp. Lee, 423, note (*a*); *Winsor v. Pratt*, 2 Brod. & Bing. 650; *S. C.*, 5 Moore, 484; *In the goods of Applebee*, 1 Hagg. 143; *In the goods of De Bode*, 5 Notes of Cas. Ecc. 189; *In the goods of Eeles*, 2 S. & T. 600; *Short v. Smith*, 4 East, 419; *Kirke v. Kirke*, 4 Russ. Ch. Ca. 435; *Locke v. James*, 11 M. & W. 901; and see principle laid down, *per* Lord Alvanley, in *Ex parte Lord Ilchester*, 7 Ves. 372; and *per* Sir Wm. Grant, *ibid.* 279. See also *Scott v. Scott*, 1 S. & T. 258; 5 Jur., N. S. 298; *In the goods of*

Cockayne, Dea. & Sw. 177; 2 Jur., N. S. 454; *Dickinson v. Stiddolph*, 11 C. B., N. S. 341; *Williams v. Tyley*, Johnson, 535, *per* Wood, V.-C.; *In the goods of Middleton*, 3 S. & T. 583; 34 L. J., P. & M. 16; *Dickenson v. Swatman*, 30 L. J., P. & M. 84; overruling *Powell v. Powell*, L. R., 1 P. & D. 209; 35 L. J., P. & M. 100; *In the goods of Weston*, L. R., 1 P. & D. 633; 38 L. J., P. & M. 53; *In the goods of Mitcheson*, 32 L. J., P. & M. 202; *Eckersley v. Platt*, L. R., 1 P. & D. 281; 36 L. J., P. & M. 7; *In the goods of Gentry*, L. R., 3 P. & D. 80, in which case revocation was held to be absolute. And *In the goods of McCabe*, L. R., 3 P. & D. 94; 42 L. J., P. & M. 79. See also Wms. on Exors. 9th ed. pp. 126—131.

(*m*) *Clarkson v. Clarkson*, 31 L. J., P. & M. 143.

(*n*) See Wms. on Exors. p. 130.

(*o*) *Ibid.* p. 131.

Dependent
relative revo-
cation.

established—though it has been thought difficult to make a satisfactory distinction—that the revocation would be effectual” (*p*).

Codicil not
revoked by
revocation of
will.

A testamentary paper in the form of a codicil to a will is not revoked by the revocation of the will; it must be revoked by one of the methods indicated in the Wills Act (*q*).

At the death of a testatrix, the only testamentary papers forthcoming were a duly executed codicil and two drafts of wills, as to the execution or revocation of which there was no evidence: it was held that though the codicil by its language was dependent on the will to which it belonged, and could not be construed without it, it ought to be admitted to probate, not having been revoked by any of the methods prescribed by the Wills Act (*r*).

Lost will,
presumption
as to revoca-
tion.

When a will has been proved to have been once duly executed, and at the death of the testator cannot be found, the presumption is that it was destroyed *animo revocandi* (*s*), but this presumption may be rebutted by evidence of the

(*p*) Wms. on Exors. p. 131.

(*q*) See *Black v. Jobling*, L. R., 1 P. & D. 685; 38 L. J., P. & M. 74 (where Lord Penzance reviewed the following decisions:—*Barrow v. Barrow*, 2 Phillim. 335; *Medlycott v. Assheton*, 2 Add. 229; *Tagart v. Hooper*, 1 Curt. 289; *Clogstown v. Wallcott*, 5 No. of Cas. Ecc. 623; *Grimwood v. Cozens*, 2 S. & T. 364; 5 Jur., N. S. 137); *In the goods of Ellice*, 33 L. J., P. & M. 27; *In the goods of Harris*, 33 L. J., P. & M. 181; *In the goods of Savage*, L. R., 2 P. & D. 78; *In the goods of Turner*, L. R., 2 P. & D. 403; *James v. Shrimpton*, 1 P. D. 431. See also *Christmas v. Whinyates*, 32 L. J., P. & M. 73; *In the goods of Dutton*, 32 L. J., P. & M. 137.

(*r*) *Gardiner v. Courthope*, 12 P.

D. 14; 56 L. J., P. D. & A. 55; 57 L. T. 280; 35 W. R. 352; 50 J. P. 791.

(*s*) *Podmore v. Whatton*, 3 S. & T. 449; 33 L. J., P. & M. 143; 10 L. T. 754; 13 W. R. 106; *Wood v. Wood*, L. R., 1 P. & D. 309; 36 L. J., P. & M. 34; 15 L. T. 593; *In the goods of Mitcheson*, 32 L. J., P. & M. 202; 9 Jur., N. S. 360. See also *Whiteley v. King*, 17 C. B., N. S. 756; 11 L. T. 342; 10 Jur., N. S. 1079; 13 W. R. 83; *Evans v. Dallow*, 31 L. J., P. & M. 128; *Burtenshaw v. Gilbert*, Cowp. 52; Lofft, 465; and *Lambell v. Lambell*, 3 Hagg. 568, cited in *Bell v. Fothergill*, L. R., 2 P. & D. at p. 150. See also *Homerton v. Hewitt*, 25 L. T. 854.

testator's intention to adhere to his will: and the question of fact whether or no the testator intended to revoke his will may depend to a considerable degree upon its contents, which, like those of any other lost instrument, may be proved by secondary evidence. Declarations, written or oral, made by a testator, both before and after the execution of a will, are, in the event of its loss, admissible as secondary evidence of its contents (*t*).

Lost will,
presumption
as to revoca-
tion.

By sect. 22, "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." Where a testamentary paper has neither a legal nor a physical existence, as where it has first been revoked by a duly executed subsequent testamentary paper, and afterwards destroyed by the testator or by some other person in his presence and by his direction, it cannot afterwards be revived (*u*).

1 Vict. c. 26,
s. 22.
Revival.

(*t*) *Sugden v. St. Leonards*, L. R., 1 P. D. 154; 45 L. J., P. & M. 49; 34 L. T. 372; 24 W. R. 479; *Brown v. Brown*, 8 E. & B. 876; 27 L. J., Q. B. 173; 4 Jur., N. S. 163, approved; *Quick v. Quick*, 3 S. & T. 442; 33 L. J., P. & M. 146; 10 L. T. 619; 10 Jur., N. S. 682; 12 W. R. 1119, overruled; and *Wharram v. Wharram*, 3 S. & T. 301; 33 L. J., P. & M. 75 (commented on). The following also were cited:—*Johnson v. Lyford*, L. R., 1 P. & D. 546; *Keen v. Keen*, L. R., 3 P. & D. 105; *In the goods of Sykes*, *ibid.* 26; *Patten v. Poulton*, 1 S. & T. 55; *In the*

goods of Ripley, 1 S. & T. 68; (no evidence as to due execution, except statement of testator, such statement not received. Approved and distinguished by Cockburn, C. J., at p. 227); *Finch v. Finch*, L. R., 1 P. & D. 371; *Burls v. Burls*, *ibid.* 472; *Vallance v. Vallance*, 1 Hagg. 693; *Trevelyan v. Trevelyan*, 1 Phil. 149; *Davis v. Davis*, 2 Add. 223; *In the goods of Gardner*, 1 S. & T. 109; *Foster v. Foster*, 1 Add. 462; *Martin v. Laking*, 1 Hagg. 244; *Knight v. Cooke*, 1 Lee, 413.

(*u*) *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J., P. & M. 49;

1 Vict. c. 26,
s. 22.
Revival.

Intention to
revive must
appear on face
of document,
or be
clearly im-
plied by some
expression.

But a revoked will, which is in existence, may be revived in the manner indicated by sect. 22; only in order to satisfy the words of the section, which require the document that is to operate the revival to "show an intention to *revive*," the intention to revive must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression, conveying to the mind of the Court, with reasonable certainty, the existence of the intention. Since the passing of the statute a will cannot be revived by mere implication. References in codicils to revoked wills by their dates are insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the wills so referred to (*x*).

The *intention to revive* must appear from the contents of the codicil itself, and cannot be satisfied by any act *dehors* the codicil, as by physical annexation, *e.g.*, tying the will and codicil together (*y*).

Where a testator having made a will, and afterwards

8 Jur., N. S. 391; 5 L. T. 719; see also *Hale v. Tokelove*, 2 Robert. 318; *Newton v. Newton*, 5 L. T. 218.

(*x*) *In the goods of Steele*, L. R., 1 P. & D. 575; reported nomine *In the goods of May*, 37 L. J., P. & M. 68; see also *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J., P. & M. 49; 8 Jur., N. S. 391; *Payne v. Trappes*, 1 Robert. 583; *Marsh v. Marsh*, 1 S. & T. 528; 30 L. J., P. & M. 77; 6 Jur., N. S. 380; *In the goods of Reynolds*, L. R., 3 P. & D. 35; 42 L. J., P. & M. 20; *In the goods of Ince*, 2 P. D. 111; 46 L. J., P. & M. 30; 25 W. R. 396; and on the subject generally (*Walpole v. Or-*

ford, 3 Ves. 402; *Walpole v. Cholmondeley*, 7 T. R. 138; *Lord St. Helens v. Marchioness of Exeter*, 3 Phill. 461, in note; *Quincey v. Quincey*, 5 No. of Cas. Ecc. 154; *In the goods of Chapman*, 1 Robert. 1; cited in *Rogers v. Goodenough*, and *In the goods of Steele*, ante; *In the goods of McCabe*, 2 S. & T. 474; *Burton v. Newbery*, L. R., 1 Ch. D. 234; 45 L. J., Ch. 202; *Anderson v. Anderson*, L. R., 13 Eq. 381; 41 L. J., Ch. 247; 20 W. R. 313; and see Wms. on Exors. 9th ed. pp. 165—169.

(*y*) *Marsh v. Marsh*, 1 S. & T. 528; 30 L. J., P. & M. 77; 6 Jur., N. S. 380.

another, which, by implication, revoked the former will, 1 Vict. c. 26, and subsequently, by the terms of a duly executed codicil, s. 22. he by mistake referred to the former instead of the later will: it was held that the codicil, by its language, revived the former will, and that, as the later will was not revoked by the codicil, all three documents must be admitted to probate (z).

A testator executed a will in 1867, and two codicils to it in 1869 and 1874; and in 1875 he made another will, by which he expressly revoked all previous wills and testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874, died, and he made another codicil in 1881 disposing of the property he had left to them, which he described as a codicil to his last will and testament, and which began in these words:—"Whereas my two sisters named in my codicil, dated 12 May, 1874, are both since dead," &c.: it was held that this reference to the codicil did not revive it, and it was, therefore, excluded from probate (a).

(z) *In the goods of Stedham*, In J. P. 40.

the goods of Dyke, 6 P. D. 205; 50

L. J., P. D. & A. 75; 45 L. T. 192;

29 W. R. 743; 45 J. P. 784; 46

(a) *In the goods of Dennis*, (1891)

P. 326; 61 L. J., P. D. & A.

CHAPTER IX.

OF THE GRANTS ISSUED BY THE PROBATE DIVISION FOR THE
PURPOSE OF ENABLING EXECUTORS AND ADMINISTRATORS
TO DEAL WITH THE PERSONAL ESTATE OF DECEASED
PERSONS.

Executors
and adminis-
trators must
be armed with
authority
of Probate
Division.

NEITHER an executor appointed by the will of a testator, nor the person or persons entitled to the personal estate of an intestate, have, generally speaking (*a*), any legal power to deal with such estate until they are armed with the authority of the Probate Division, which is conferred upon them by a "*grant*," which issues out either of the principal registry at Somerset House, or one of the district registries.

These grants may be divided into three principal heads:—

1. Probate.
2. Letters of administration with the will annexed.
3. Letters of administration pure and simple.

Grant of
probate, what
is.

The grant of probate issues only where there is a will by which an executor is appointed either directly or by necessary implication.

It is defined to be a copy of the will by which the executor is appointed, certified under the seal of the Court.

And "nothing but the probate or the letters of administration with the will annexed, . . . or other proof tantamount thereto of the admission of the will in the Probate Division, is legal evidence of the will in any question respecting personalty" (*b*).

(*a*) As to what an executor or administrator may do before pro-

bate or administration is granted, see *post*.
(*b*) Wms. on Exors. 9th ed. p. 242.

“The probate is, however, merely operative as the authenticated evidence, and not at all as the foundation of the executor’s title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the time of the testator’s death. Hence the probate, when produced, is said to have relation to the testator’s death” (c).

Grants of probate.

Probate may be granted either in common form or in solemn form. “In probate of wills there is one form which is slight and summary for ordinary and undisputed cases, and another more formal by solemn decrees of the Court” (d).

By granting probate in common form on affidavits, the Court does not preclude anyone interested in the property from contesting the paper at a future period.

In common form, what is

Probate in solemn form is, with some exceptions, conclusive on all who are parties to the proceedings or cognizant of them. The exceptions to its conclusive effect are generally where the decree has been obtained by fraud or collusion, or where a later will has been discovered (e).

In solemn form, what is

The grant of letters of administration with the will annexed is made when there is a will in existence, but no executor is therein appointed, or the appointment of executor fails (f).

Grant of administration with the will annexed, what is.

“It often happens, that the deceased, although he makes a will, appoints no executor, or else the appointment fails: in either of which events, he is said to die *quasi intestatus*. The appointment of executor fails (1) where the person appointed refuses to act; (2) where the person appointed dies before the testator, or before he has proved the will; or where . . . he is incapable of acting;

Quasi intestatus.

(c) Wms. on Exors. 9th ed. p. 243.

(d) *Duke of Portland v. Bingham*, 1 Hagg. 158, per Sir W. Scott.

(e) *Wedderburn v. S. G.*, in the *Duchess of Kingston’s case*, 20 St. Tr.

478; cited by Lord Brougham, *Meddowcroft v. Huguenin*, 4 Moo. P. C. 396. See also *Cutto v. Gilbert*, 9 Moo. P. C. 131.

(f) See Wms. on Exors. 9th ed. p. 242.

Grant of
administra-
tion with the
will annexed.

(3) where the executor dies intestate, after having proved the will, but before he has administered all the personal estate of the deceased. In all these cases, as well as where no executor is appointed, the Court must grant an administration, which is called *administration with the will annexed*; and in the last instance it is also called *administration de bonis non*" (g).

Grant of
simple
administra-
tion, what is.

The grant of letters of administration pure and simple is made where the deceased has died wholly intestate as to his personal estate.

13 Edw. I.
c. 19; 31
Edw. III.
st. 1, c. 11.

The sole right of dealing with the personal estate of persons dying intestate belonged originally to the sovereign, by whom it was in process of time transferred to the Ordinary. The power of the latter was unlimited until the passing of (1) Statute of Westminster II. (13 Edw. I. c. 19), and (2) 31 Edw. III. st. 1, c. 11, which latter statute provides "that in case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods; which persons so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate, in the King's Court, to administer and dispend for the soul of the dead; and shall answer also in the King's Court, to others to whom the said deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament as well of the time past as the time to come" (h).

This, therefore, was the origin of administrators who were the officers of the Ecclesiastical Courts, whose jurisdiction, in matters relating to probates and administrations, is now exercised by the Probate Division.

The next statute on this subject (21 Hen. VIII. c. 5)

(g) See Wms. on Exors. 9th ed.
p. 399. Administration de bonis is
not necessarily an *administration*
with the will annexed. See *post*,

Chap. 17.

(h) See Wms. on Exors. 9th ed.
pp. 339—342.

substitutes the words "*widow or next of kin or both*" for 21 Hen. VIII.
 "*next and most lawful friends*"; and no further powers c. 5.
 with respect to the appointment of administrators of
 the personal estate of intestates were conferred on any of
 the tribunals having jurisdiction over the personal estate
 of deceased persons, until the passing of the 73rd section
 of the Court of Probate Act, 1857 (i).

It will be seen, when we come to deal with these grants Grants either
 more particularly, that they are sometimes "*general*" and general or
 sometimes "*limited*," i.e., "*general*" when the power con- limited.
 ferred by them is co-extensive with the personal estate left by
 the deceased and unlimited as to time, and "*limited*" when
 such power extends over a portion only of such estate, or
 is granted only for a certain period of time, limited in most
 cases to the happening of some event, as the coming of age
 of a minor, the realizing of debts due to, or the payments
 of debts due by, the deceased, or some other event con-
 nected with the future history of the estate.

(i) *Ibid.* See also *post*, Chaps. 16, 17, 18.

CHAPTER X.

OF THE APPOINTMENT OF EXECUTORS (*a*).

Who may be
an executor.

“GENERALLY speaking, all persons who are capable of making wills, and some others besides, are capable of being executors. From the earliest time it has been a rule, that every person may be an executor save such as are expressly forbidden” (*b*).

The
sovereign.

The sovereign may be an executor, but, if appointed, he nominates such persons as he thinks fit to officiate the execution of the will, against whom parties having claims against the estate may bring their actions (*c*).

Corporations.

A corporation sole may be nominated executor, and can take a grant of probate in the same manner as an individual; but if a corporation aggregate be so nominated, they cannot take a grant of probate, but may appoint persons styled *syndics*, to whom a grant will be made of administration with the will annexed (*d*).

Firm of
partners.

A firm consisting of several partners may be appointed executors; and where a testator appointed his brother, and “Messrs. Cockerell & Co., East India Agents, London,” and a third person executors, and the firm of Cockerell & Co. had been dissolved during the testator’s lifetime, Sir H. J. Fust held, that the appointment was not of the firm collectively, but of the individuals who composed it, and

(*a*) See on this subject Wms. on Exors. 9th ed. pp. 181—235.

(*b*) Wms. on Exors. 9th ed. p. 183.

(*c*) *Ibid.*

(*d*) Wms. on Exors. 9th ed. pp. 183, 184. See also *In the goods of Darke*, 1 S. & T. 516; 29 L. J., P. & M. 71; 2 L. T. 24; 8 W. R. 273; *In the goods of Haynes*, 3 Curt. 75.

therefore each of the members was entitled to be joined in the grant of probate with the other executors (*e*).

Since the passing of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), an alien, with respect to his eligibility for the office of executor, stands in the same position as a natural-born British subject (*f*). Alien.

An infant, whether male or female, may be appointed executor; but, if such be appointed sole executor, by 38 Geo. 3, c. 87, s. 6, a grant of administration with the will annexed is to be granted to the guardian of such infant, or to such other person as the Court shall think fit, until such infant shall have attained the age of twenty-one years (*g*). Infant.

"Even a child *in ventre sa mère* may be appointed, and if the mother bring forth two or three children at one birth, they are all to be admitted executors" (*h*). Child *in ventre sa mère*.

"Formerly a married woman could not by the law of England take upon her the office of executrix or administratrix without the consent of her husband" (*i*). Feme covert.

Now by sect. 1, sub-sect. 2, of the Married Women's Property Act, 1882, it is provided that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property . . . as if she were a *feme sole*." Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, subs. 2.

And by sect. 24, the word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. *Ibid.*, sect. 24.

(*e*) *In the goods of Fernie*, 6 No. of Ca. Ecc. 657. See also Wms. on Exors. 9th ed. p. 184.

(*f*) *Ibid.*

(*g*) See Wms. on Exors. pp. 184, 185; also *post*, Chap. 18.

(*h*) *Ibid.* p. 184.

(*i*) *Ibid.* p. 185.

Married
Women's
Property Act,
1882.

45 & 46 Vict.
c. 75, s. 18.

Married
woman execu-
trix or ad-
ministratrix.

The word "property" in this Act includes a thing in action.

And by sect. 18 a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Applies to all
married
women.

"The provisions of this Act apply to any married woman whether married before or after the commencement of the Act (*k*), and so since this date (January 1, 1883) it has become unnecessary to consider the question with regard to the consent of the husband, as the wife as such executrix or administratrix now acts independently of him in all respects as if she were a *feme sole*" (*l*).

Persons
attaint, out-
laws, &c., &c.

Persons convicted of felony, outlaws, and *à fortiori* persons in mean and insolvent circumstances, may all be appointed executors, though the Chancery Division will in certain cases interfere for the protection of the estate, by appointing a receiver, or compelling a bankrupt executor to give security before entering upon the duties of his office.

Injunction
granted in
Probate Divi-
sion.

And where an executor, before obtaining probate and without the consent of his co-executor, intermeddled with assets, and made preparations to sell, the Probate Division granted leave to the co-executor to issue a writ for an injunction and for a receiver (*m*).

(*k*) That is, of course, unless its operation is circumscribed by the terms of a particular section, as sect. 2. *Ante*, p. 55.

(*l*) Wms. on Exors. 9th ed.

p. 186.

(*m*) *In the goods of Moore*, 13 P. D. 36; 57 L. J., P. D. & A. 37; 58 L. T. 386; 36 W. R. 576; 52 J. P. 200.

But the Chancery Division will not grant a receiver on the single ground that the executor is in mean circumstances, nor if the testator appointed him knowing him to be bankrupt. But it may be otherwise where the executor became bankrupt in the lifetime of the testator, but after the will was made. For it must not be inferred from the mere fact of the testator not having altered his will, that he had a deliberate intention to intrust the management of his estate to a bankrupt (*n*). Even an executor convicted of felony after his testator's death is entitled to probate (*o*).

Bankrupt executor. Interference by Chancery Division.

Persons of unsound mind are incapable of being executors, and if an executor become *non compos* after having taken probate, the Court may set him aside, and grant administration to a third party (*p*).

Idiots and lunatics.

The only persons entitled to prove a will are the executors, who are of two kinds—(1) *executors nominate*, or such as are appointed in express terms, and (2) *executors according to the tenor*, or such as are appointed by inference from the contents of a testamentary document.

Executors nominate—according to tenor ;

An executor can derive his office only from a testamentary appointment, and such appointment may be (1) *absolute*, viz., when it extends over the whole of the testator's effects and is without limitation in point of time ; or it may be (2) *qualified*, viz., when it is created conditionally, or is limited "as to the time or place wherein, or the subject matter whereon, the office is to be exercised." In the first case the GRANT made by the Court will be GENERAL, and in the second LIMITED. But whether the appointment be in express terms, or by inference, there must be no uncertainty left in the mind of the Court whether such appointment has really been made or not.

can be appointed by will only ;

extent of office ;

appointment must be certain.

The following are examples of cases in which persons

(*n*) See, as to interference by Chancery Division, Wms. on Exors. 9th ed. pp. 187, 188, and Pt. V., Bk. II., Ch. II.

(*o*) 2 S. & T. 143 ; 30 L. J., P. & M. 269 ; 7 Jur., N. S. 763.

(*p*) See Wms. on Exors. 9th ed. p. 188.

Executor according to the tenor.

have been held to have been appointed *executors according to the tenor* by inference from the terms of the will (*q*).

What amounts to appointment of.

Direction to pay debts, funeral expenses, &c.

Where the will contains a direction to certain persons to pay debts, funeral expenses, and expenses of probate, such persons are appointed *executors according to the tenor* (*r*); but it must be clear, from the words of the will, that the testator intended such persons to collect his assets, pay his debts and funeral expenses, discharge the legacies bequeathed by the will, and administer the estate generally (*s*).

Where a testator gave to two persons all his real and personal estate, to apply the same, after payment of debts, to the payment of legacies, the Court granted probate of the will to these two persons as executors according to the tenor (*t*).

Of codicil.

Where in a codicil a testatrix ordered certain ornaments to be transmitted to the executor of her will, to whom also the proceeds of the sale of her property in Jerusalem were to be remitted, and with the amount the executor was instructed to pay a legacy bequeathed by the codicil, the Court held that the executor of the will was executor according to the tenor of the codicil (*u*); and where, after the death of a son, who had been appointed one of the executors of his father's will, the testator executed a codicil wherein he appointed B. as "*trustee*" in the place of his said son, and directed him (together with the surviving executors), to get in his estate and distribute it after a certain manner, "after paying all my funeral and other

(*q*) See on this subject Wms. on Exors. 9th ed. pp. 189—194.

(*r*) *In the goods of Fry*, 1 Hagg. 80. See also *Pickering v. Towers*, 2 Cas. temp. Lee, 401.

(*s*) *In the goods of Adamson*, L. R., 3 P. & D. 253.

(*t*) *In the goods of Bell*, 4 P. D. 85; 40 L. T. 659. See also

In the goods of Saunders, 11 Jur., N. S. 1027; *In the goods of Baylis*, 35 L. J., P. & M. 15; 13 L. T. 446; 11 Jur., N. S. 1028; *In the goods of Chappell*, 37 L. J., P. & M. 32; 17 L. T. 618; 16 W. R. 488.

(*u*) *In the goods of Cooper*, 8 Jur., N. S. 394; 1 S. & T. 66.

expenses," the Court held that B. was appointed executor according to the tenor (*x*).

Executor according to the tenor.

Where a testatrix duly executed a testamentary paper in the form of a letter commencing "My dear E.," and containing full information as to the amount of her property, with full directions as to how she wished it to be disposed of, and concluding with these words: "I know of nothing else, my dear E., to trouble you with, and trust that this will not involve you in much," the Court granted probate to E. as executrix according to the tenor (*y*).

Appointment of, what amounts to. Testamentary paper in form of letter.

Where A. appointed two persons trustees, to dispose of his effects as they thought fit, and to receive his life assurance for the benefit of his two sons, the Court held that they were executors according to the tenor (*z*).

Trustees.

Where a will contained this clause, "I appoint my sister my executrix, only requesting that my nephews will kindly act for and with this dear sister," the Court held that such nephews were executors according to the tenor (*a*).

Where a testator in his will said, "I appoint P. and W.," but did not state in what capacity he appointed them, but he bequeathed legacies to "each of my executors," and gave the residue to "my said executors," with certain directions as to the disposal of it, the Court held that P. and W. were appointed executors according to the tenor (*b*).

And where a testator, who had made his will without legal assistance, had neither by his will nor codicils made any direct appointment of executors, but had appointed four persons as his trustees, and had bequeathed to them the residue of his estate in trust for division, and authorized

(*x*) *In the goods of Lush*, 13 P. D. 20; 57 L. J., P. D. & A. 23; 58 L. T. 684; 36 W. R. 847; 52 J. P. 199.

(*y*) *In the goods of Manly*, 3 S. & T. 56; 31 L. J., P. & M. 198; 7 L. T. 220; 8 Jur., N. S. 493.

(*z*) *In the goods of Gale*, 18 L. T. 696; 16 W. R. 942.

(*a*) *In the goods of Brown*, L. R., 2 P. D. 110; 46 L. J., P. & M. 31; 36 L. T. 519; 25 W. R. 431. See also *In the goods of Glasson*, 22 W. R. 845; *In the goods of Tracy*, 31 L. T. 801; 23 W. R. 385.

(*b*) *In the goods of Bradley*, 8 P. D. 215; 52 L. J., P. D. & A. 101; 32 W. R. 324; 47 J. P. 825.

Executor according to the tenor.

Appointment of, what amounts to.

them to receive debts due to his estate, and give a receipt for the same; and the will contained directions to "*my executors*" to pay his debts and funeral and testamentary expenses, and as to the disposition of various portions of his estate, and the word "*executors*" occurred frequently; and the language of the will showed generally that the testator intended the four persons named as trustees to act as executors, and he had referred to them indiscriminately, sometimes as "*trustees*" and sometimes as "*executors*," in either case meaning the same four persons; the Court held that such persons were appointed executors according to the tenor (*c*).

What is not.

Direction to pay debts out of particular fund.

On the other hand, a direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not constitute him an executor according to the tenor (*d*).

Trustee.

Unless the Court can gather from the words of a will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor (*e*).

In other words, if a person be appointed trustee by a will, and the duties created by the will are such as would properly devolve upon a trustee, rather than upon an executor, such an appointment will not constitute him an executor according to the tenor (*f*).

(*c*) *In the goods of Leven*, 15 P. D. 22; 59 L. J., P. D. & A. 35.

(*d*) *In the goods of Toomy*, 3 S. & T. 562; 34 L. J., P. & M. 3; 13 W. R. 106. See also *In the goods of Smith*, 3 S. & T. 561; 34 L. J., P. & M. 15; 10 Jur., N. S. 1084.

(*e*) *In the goods of Punchard*, L. R., 2 P. & D. 369; 41 L. J., P. & M. 25; 26 L. T. 526; 20 W. R. 446.

(*f*) *Ibid.* And see *In the goods of Lowry*, L. R., 3 P. & D. 157; 43

L. J., P. & M. 34; 30 L. T. 695; 22 W. R. 352. See also *In the goods of Montgomery*, 5 No. of Ca. Ecc. 99; *In the goods of Jones*, 2 S. & T. 155; 31 L. J., P. & M. 199; 4 L. T. 477; *In the goods of Heaton*, 7 Jur. 832; *In the goods of Fraser*, L. R., 2 P. & D. 183; 40 L. J., P. & M. 9; 24 L. T. 72; 19 W. R. 333; *In the goods of Stewart*, L. R., 3 P. & D. 244; 44 L. J., P. & M. 37; 33 L. T. 72; 23 W. R. 683.

Neither is the universal legatee of a testamentary paper entitled to probate as executor according to the tenor, but he will be entitled to a grant of administration with the will annexed (*g*).

Executor according to the tenor. Appointment of, what is not. Universal legatee.

Where deceased left one sovereign to the “*executor and witness*” of her will, and then named nobody executor, but opposite the names of the attesting witnesses were the words “*executors and witnesses*,” the Court held there was no appointment of executors (*h*).

And appointments of executors “with any two of my sons” where the testator left three sons (*i*), and of “*one of my sisters sole executrix*” where the testator left three sisters, were held to be void for uncertainty (*k*).

Appointment void for uncertainty.

And an appointment in a will, in which there was no residuary clause, of the testator’s daughter “*executrix for all property whatsoever and wheresoever, not named in the will*,” was held not to constitute her executrix (*l*).

But where a testator appointed each of his sons, on coming of age, executor of his will, “so far as respects any residuary, real and personal estate, and the aggregate fund forming my general estate,” the Court held, that each of the sons, on coming of age, was entitled to probate, limited as far as possible in the words used by the testator (*m*).

Limited appointment.

And appointments of “*my wife M. G.*” executrix, where the marriage was illegal on the ground of affinity, but

(*g*) *In the goods of Oliphant*, 1 S. & T. 525; 30 L. J., P. & M. 82; 6 Jur., N. S. 256. And see *post*, Chap. XIV.

L. T. 251; 1 Jur. N. S. 546.

(*h*) *In the goods of Woods*, L. R., 1 P. & D. 556; 37 L. J., P. & M. 23; 17 L. T. 583; 16 W. R. 407. See also *In the goods of Dallow*, L. R., 1 P. & D. 189; 35 L. J., P. & M. 81; 14 L. T. 573; 12 Jur., N. S. 492.

(*k*) *In the goods of Blackwell*, L. R., 2 P. D. 72; 46 L. J., P. & M. 29; 36 L. T. 413; 25 W. R. 305. See also *In the goods of Bonham*, 8 Jur. N. S. 596.

(*l*) *In the goods of Wakeham*, L. R., 2 P. & D. 395; 41 L. J., P. & M. 46; 27 L. T. 214; 20 W. R. 685.

(*i*) *In the goods of Baylis*, 2 S. & T. 613; 31 L. J., P. & M. 119; 7

(*m*) *In the goods of Barnes*, 7 Jur., N. S. 195.

Appointment of executor. What amounts to. there was no doubt who was intended by the testator (*n*), and of the residuary legatees, testator's widow and son, "whole and sole executrix," were held valid (*o*).

Where a married woman executed a will under a power by which she appointed three persons executors, and subsequently another will disposing of different property, by which she appointed one of the above persons sole executor, probate was granted of both wills to the three executors named in the first (*p*).

Revocation of, by implication.

But where the testator by his will appointed two executors, and by a codicil appointed his wife "sole executrix," the Court held that the appointment of the two executors in the will was revoked, and granted probate to the wife only (*q*).

Where a testator made two wills, by the first of which he appointed his wife executrix, and by the second S. executor, but did not revoke his first will, probate of both wills was granted to the widow, leave being reserved to S. to come in and prove (*r*).

Ambiguity removed by parol evidence.

Where a testator appointed "*Percival — of Brighton the father*," one of his executors, the Court admitted parol evidence to show who was meant (*s*).

(*n*) *In the goods of Gausden*, 31 L. J., P. & M. 53.

(*o*) *In the goods of Court*, 2 S. & T. 485; 31 L. J., P. & M. 61; 6 L. T. 658; 10 W. R. 809; 8 Jur., N. S. 142.

(*p*) *In the goods of Morgan*, L. R., 1 P. & D. 323; 36 L. J., P. & M. 64; 16 L. T. 181. See also *In the goods of Merritt*, 1 S. & T. 112; 4 Jur., N. S. 1192; *In the goods of Graham*, 3 S. & T. 69; 32 L. J., P. & M. 113; 8 L. T. 610; 11 W. R. 638; *Geaves v. Price*, 3 S. & T. 71; 32 L. J., P. & M. 113; 8 L. T. 610; 11 W. R. 809; *In the goods of Griffith*, L. R., 2 P. & D. 457.

(*q*) *In the goods of Lowe*, 3 S. &

T. 478; 33 L. J., P. & M. 155.

(*r*) *In the goods of Andrew*, 42 L. J., P. & M. 38; 28 L. T. 238; 21 W. R. 391. See also *In the goods of Leese*, 2 S. & T. 442; 31 L. J., P. & M. 169; 5 L. T. 848; *In the goods of Gausson*, 17 L. T. 354; 16 W. R. 212.

(*s*) *In the goods of De Rosaz*, L. R., 2 P. D. 66; 46 L. J., P. & M. 6; 36 L. T. 263; 25 W. R. 352. See also *Grant v. Grant*, L. R., 2 P. & D. 8; 39 L. J., P. & M. 17; 21 L. T. 645; *S. P. & S. C.*, L. R., 5 C. P. 727; 3 L. J., C. P. 272; 22 L. T. 829; 18 W. R. 951; *Charter v. Charter*, L. R., 2 P. & D. 315; 41 L. J., P. & M. 10; 20 W.

And where a codicil referred to a will by date, in which an appointment of an executor was written on an erasure, the Court admitted parol evidence of declarations of the testator made before the execution of the codicil, as to the person whom he had appointed executor (*t*). Name of executor written on an erasure.

In a more recent case the testator, a congregational minister, appointed "William McCormack of Canonbury" executor of his will. There being no person in existence who answered the description of "William McCormack of Canonbury," the Court admitted evidence to show that there was a person called "Thomas McCormack," who had been for many years a deacon of the testator's chapel, and whom he had intended to appoint as his executor, and granted probate to "Thomas McCormack" accordingly (*u*). Executor incorrectly described.

But where a testator appointed "*Francis Courtenay Thorpe of Hampton, gentleman*," one of his executors, the Court refused to admit parol evidence to show that the testator did not mean a boy of twelve years old answering the description, but his father, whose name was *Francis Corbet Thorpe* (*x*). Where parol evidence not so admitted.

"There is a wide distinction between the office of coadjutor or overseer and that of executor. The coadjutor or overseer has no power to intermeddle otherwise than to counsel, persuade, and advise; and if that fail to remedy negligence or miscarriage in the executors, he may complain to the Court, and his charges in doing so ought to be allowed out of the testator's estate. It is therefore material to inquire what words in a will amount only to an appointment, as, if A. be made an executor, and B. a coadjutor, without more, he is not by this made a joint executor with A. But if A. be made an executor, and the testator What words appoint a co-adjutor. Distinction between his office and that of executor.

R. 212; *In the goods of O'Reilly*, 43 L. J., P. & M. 5; 29 L. T. 546; *In the goods of Gaskill*, 33 L. T. 578. (*u*) *In the goods of Brake*, 6 P. D. 217; 50 L. J., P. D. & A. 48; 45 L. T. 191; 29 W. R. 744.

(*t*) *In the goods of Sykes*, L. R., 3 P. & D. 26; 42 L. J., P. & M. 17; 28 L. T. 142; 21 W. R. 416. (*x*) *In the goods of Peel*, L. R., 2 P. & D. 46; 39 L. J., P. & M. 36; 22 L. T. 417.

Co-adjutor,
office of,
distinguished
from that of
executor.

after in his will expresseth a wish that B. shall administer also with him, and in aid of him, here B. is an executor as well as A., and may prove the will alone as executor if A. refuse. Where an infant was made executor, and A. and B. *overseers*, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant, by this they were held to be executors in the meantime.

Executor
according to
tenor proving
with executor
nominate.

“Although, when there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection, either in principle or practice, to admit an executor according to the tenor to probate, jointly with an executor expressly nominated” (y).

Substituted
executors.

“A testator may appoint several persons as executors in several degrees; as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on. In this case the wife is said to be *instituted* executor in the first degree; B. is said to be *substituted* in the second degree; C. to be *substituted* in the third degree, and so on.

If instituted
executor
accepts office
and dies
intestate, the
substitutes are
all excluded.

“It must be observed that if an instituted executor once accepts the office, and afterwards dies intestate, the substitutes, in what degree soever, are all excluded; because the condition of law (if he will not or cannot be executor) was once accomplished by such acceptance of the instituted executor” (z).

Secus, if
substituted
executor
appointed on
the happening
of a specified
contingency.

But it is otherwise if the testator appoint a substituted executor on the happening of a specified contingency, as where the testator appointed his son sole executor, but in the event of his going abroad, or being and remaining abroad two calendar months, then B. The Court, upon

(y) Wms. on Exors. 9th ed. p. 46 L. J., P. & M. 31; 36 L. T. 194; and see further on this point, *ibid.* pp. 193—195. See also 519; 25 W. R. 431.

(z) Wms. on Exors. 9th ed. pp. 196, 197.
In the goods of Brown, 2 P. D. 110;

the contingency happening, granted probate to B., leave being reserved to the son to come in and prove the will (*a*). Contingent appointment.

In every such case, the Court will look to see whether the contingency has taken place or not (*b*), and the right of the *substituted* executor will not be affected by the mere fact that the instituted executor has already proved the will (*c*); nor by the fact he has predeceased the testator (*d*). Court will look to see if contingency has happened.

A testator may, by his will, give power to some third person to appoint executors for him (*e*); and the person to whom such power has been delegated may appoint himself (*f*). Delegated appointment.

As we have already seen (*g*), the appointment of executor "may be qualified, by limitations as to the time or place wherein or subject-matter whereon the office is to be exercised, or the creation of the office may be conditional" (*h*). Appointment of executor, how qualified.

Thus, a testator may appoint a man to be executor five years after his death, or on the death or marriage of his son, or if he marries A. B., or for a particular time, as for five years after his death, or during the minority of his son, or the widowhood of his wife, or in a thousand similar cases which may suggest themselves. In all such cases the appointment is good (*i*). 1. Limitations in point of time.

"In like manner the appointment may be limited in point of place; as thus, the testator may make A. his 2. Limitations in point of place.

(*a*) *In the goods of Lane*, 33 L. J., P. & M. 185.

(*b*) See *In the goods of Langford*, L. R., 1 P. & D. 458; 37 L. J., P. & M. 20; 17 L. T. 415; *In the goods of Lighton*, 1 Hagg. 235; *In the goods of Colquhoun*, 37 L. J., P. & M. 1; 17 L. T. 123; 16 W. R. 88; *In the goods of Johnson*, 1 S. & T. 17; 27 L. J., P. & M. 9; *Moss v. Bardswell*, 3 S. & T. 187; 29 L. J., P. & M. 117; 6 Jur., N. S. 589; 8 W. R. 503; *Naylor v. Stainsby*, 2 Lee, 54; *In the goods of Goodworth*, 37 L. J., P. & M. 49.

(*c*) *In the goods of Foster*, L. R., 2 P. & D. 304; 41 L. J., P. & M. 18; 25 L. T. 763; 20 W. R. 302.

(*d*) *In the goods of Betts*, 30 L. J., P. & M. 167.

(*e*) *In the goods of Cringan*, 1 Hagg. 548; *Jackson v. Paulet*, 2 Robert. 345.

(*f*) *In the goods of Ryder*, 2 S. & T. 127; 31 L. J., P. & M. 215; 3 L. T. 756; 7 Jur. N. S. 196.

(*g*) *Ante*, p. 109.

(*h*) *Wms. on Exors.* 9th ed. p. 199.

(*i*) *Ibid.* pp. 199, 200.

Appointment of executors, how qualified. 2. Limitations in point of place. executor for his goods in Cornwall, B. for those in Devon, and C. for those in Somerset . . . or which seems more rational and expedient, he may so divide the duty when his property is in various countries" (*j*).

This is indeed the commonest instance, and is of pretty frequent occurrence; as where an executor appointed one set of executors for Portugal and one for England (*k*); or the same with respect to India (*l*), or America (*m*), or Tasmania (*n*), and England; and so on through innumerable examples that might be cited (*o*).

3. Limitations as to the subject-matter. "Again, the power of an executor may be limited as to the subject-matter upon which it is to be exercised. Thus the testator may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his estates by extent, and D. for his debts due to him" (*p*).

4. The appointment may be conditional. Or the appointment may be conditional, as where "the testator willed that if his wife suffered J. S. to enjoy Blackacre for three years she should be executrix, but if she disturbed J. S., then he made his son executor" (*q*).

In what cases the appointed executor may transmit his appointment. An executor cannot assign his executorship, but he can transmit it by will (*r*). So if a man be sole executor to a testator, and he dies leaving a will, wherein he appoints an executor, such executor becomes executor to the original testator. But it is otherwise if the executor die intestate, for in that case the representation to the original testator is not transmitted. The reason of this is obvious. The

(*j*) Wms. on Exors. 9th ed. pp. 200, 201.

(*k*) *Velho v. Leite*, 3 S. & T. 456; 33 L. J., P. & M. 107.

(*l*) *In the goods of Wallich*, 3 S. & T. 423; 33 L. J., P. & M. 87; 9 L. T. 809.

(*m*) *In the goods of Astor*, L. R., 1 P. D. 150; 45 L. J., P. & M. 78; 34 L. T. 856; 24 W. R. 539.

(*n*) *In the goods of Harris*, L. R., 2 P. & D. 83; 39 L. J., P. & M. 48.

(*o*) See also *In the goods of Pulman*, 3 S. & T. 269; 33 L. J., P. & M. 20; 9 L. T. 347; 12 W. R. 60; 9 Jur., N. S. 1204; *In the goods of Calloway*, 15 P. D. 147; 59 L. J., P. D. & A. 73; 63 L. T. 227; 38 W. R. 528. See also LIMITED GRANTS, *post*.

(*p*) Wms. on Exors. 9th ed. pp. 201, 202.

(*q*) *Ibid.*, p. 202.

(*r*) See, on this subject, Wms. on Exors. 9th ed. pp. 204—207.

power of an executor is founded on the trust and confidence reposed in him by his testator, and this trust and confidence are considered to be sufficient to warrant him in deciding who is to succeed him in the representation to the estate of the original testator. If, however, he die intestate he appoints nobody, and the administrator who represents him is only an officer appointed by the Court, who has no privity with the original testator. In that case the Court makes what is called a grant of administration *de bonis non* to the estate of the original testator (s).

Chain of representation.

So long then as the chain of representation is unbroken by an intestacy, the ultimate executor of the first executor is the representative of the original testator. Provided always, that is, that the first executor has proved the will, for if he die without having done so he cannot transmit his executorship. In that case an administrator, with the will of the original testator annexed, must be appointed (t).

First executor must have taken out probate.

“If there are several executors appointed, and one of them dies, leaving one or more of his co-executors living, no interest in the executorship is transmissible to his own executor, but the whole representation survives and will be transmitted ultimately to the executor, or the surviving executor, unless he dies intestate”(u).

Where more than one executor.

The following statement of the conditions under which the chain of executorship is broken in law is cited by Mr. Justice Williams (x) from Tristram and Coote's Probate Practice (y):—

Chain of executorship, when broken in law.

1. When the immediate sole acting executor dies intestate or testate without appointing an executor.

2. When the survivor of the immediate acting executors dies intestate.

(s) See Chap. XVII.

p. 206.

(t) See Chap. XIV.

(x) *Ibid.*

(u) Wms. on Exors. 9th ed.

(y) 11th ed. p. 174.

Chain of
executorship,
when broken
in law.

3. When the remote sole acting executor, to whom an executorship has been transmitted downwards, *per catenary*, dies intestate.

4. When the survivor of the remote acting executors dies intestate.

5. When the remote executor or executors renounce the probate of their own testator's will or have been cited and do not appear.

6. When the remote executor or executors die without having proved their own testator's will.

7. When of two or more executors, who have died after probate taken by them, it is impossible to show which survived the other or others.

8. When one of the executors, having renounced before January 1st, 1858, has survived the other or others.

Executor *de
son tort*.

An *executor de son tort* is defined to be: "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for the want of such constitution, substituted by the Court to administer" (z); but as the limits of this work will not permit a discussion of the position and liabilities of an *executor de son tort*, the reader is simply referred to Williams on Executors (a).

Executors
cannot be
compelled to
accept the
office.

"The office of executor being a private one of trust, named by the testator, and not by the law, the person nominated may refuse, though he cannot assign the office; and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede.

May be cited
to take or
refuse
probate.

"But though the executor cannot be compelled to accept the executorship, whether he will or not, yet by stat. 21 Hen. 8, c. 5, s. 8, the Ordinary might convene before him any person made and named executor of any testament, 'to the intent to prove or refuse the testament'; and if he neglected to appear, he was, previous to the stat. 53

(z) Swinburn, Pt. 4, S. 23, pl. 1;
Godolph, Pt. 2, c. 8, S. 1; Wentw.
Off. Ex. c. 14, p. 230, 14th ed.

Cited Wms. on Exors. 9th ed.
p. 208, n. (a).

(a) 9th ed. pp. 208—224.

Geo. 3, c. 127, punishable by excommunication for a contempt; and might subsequently be dealt with in the mode substituted by that statute, s. 2, for excommunication”(b).

Executor may be cited to take or refuse probate.

The 23rd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), confers upon the Court of Probate the powers of the Prerogative Court of the Archbishop of Canterbury, and the practice is, wherever necessary, to cite the executor to take or refuse probate. If the executor neglect to appear to such citation, he may be punished for contempt of Court under the 25th section.

C. P. Act, 1857, ss. 23, 25.

And by section 79 of the same statute, “where any person after the commencement of this Act renounces probate of the will of which he is appointed executor or one of the executors;” and by sect. 16 of the Amending Act (21 & 22 Vict. c. 95), “whenever an executor appointed in a will survives the testator but dies without having taken probate, and whenever an executor in a will is cited to take probate and does not appear to such citation;” then “the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor.” And the same is the case where an executor, to whom power has been reserved, survives his co-executor and does not appear to a citation (c).

C. P. Act, 1857, s. 79.

C. P. Act, 1858, s. 16.
Effect of renunciation or disobedience to citation to take or refuse probate.

As to the manner in which an executor may renounce, see *post*, Chapter XIX.

Practice.

But although an executor is not compelled to accept the executorship, if he *intermeddle in* (that is to say, *interfere with*) the administration of the estate, he will be compellable to take probate.

Executor intermeddling.

(b) Wms. on Exors. 9th ed. p. 225; and see on the subject of renunciation by executors generally,

ibid. pp. 225—235.

(c) *In the goods of Noddings*, 2 S. & T. 15; 9 W. R. 40.

Executor intermeddling, what amounts to.

"With respect to what acts will amount to an administering, such as to render an executor compellable to take probate, two general rules may be laid down: 1st, that whatever the executor does with relation to the goods and effects of the testator which shows an intention in him to take upon him the executorship, will regularly amount to an administration. 2ndly, that whatever acts will make a man liable as an *executor de son tort*, will be deemed an election of the executorship" (e).

Advertising for debts due to or from deceased.

An advertisement inserted in divers newspapers calling upon persons to send in their accounts, and to pay money due to the testator's estate, to A. and B., "his executors in trust," was held to make A. and B. compellable to take probate (f).

Executor may renounce after he is sworn.

But "taking the oath as executor is not to be considered as an intermeddling, so as to preclude renunciation" (g).

Retracting renunciation.

It has never been decided that an executor who has filed a renunciation of his rights may not retract such renunciation, notwithstanding the terms of the Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79 (h), but he certainly will not be allowed to do so, unless he can show that such retraction will be for the benefit of the estate or of those interested under the will (i).

Where an executor has intermeddled, he can be cited to enter an appearance and take probate, and his disobedience to do both these acts will be a contempt of Court, but the Court will not attach him for disobedience in the first instance. For where the executors of a will intermeddled

(e) Wms. on Exors. 9th ed. pp. 228, 229.

(f) *Long v. Symes*, 3 Hagg. 771. And see further on this subject, Wms. on Exors. 9th ed. pp. 228—231.

(g) *Ibid.* p. 231.

(h) *Ante*, p. 121.

(i) *In the goods of Gill*, L. R., 3 P. & D. 113. See also *In the*

goods of Noddings, 2 S. & T. 15; 9 W. R. 40; *In the goods of Badenach*, 3 S. & T. 465; 33 L. J., P. & M. 179; 11 L. T. 275; 10 Jur., N. S. 521; *In the goods of Whitham*, L. R., 1 P. & D. 303; 36 L. J., P. & M. 26; 15 L. T. 447; 15 W. R. 560; *Jackson v. Whitehead*, 3 Phill. 577; *In the goods of Elmsley*, 48 L. T. 125.

in the estate, without taking probate, and a citation having been served upon them to enter an appearance and take probate, they entered an appearance, but took no further steps in the matter; the Court refused to grant an attachment against them for contempt in not obeying the citation, but directed a peremptory order to be served upon them to take probate within ten days of the order (*k*).

Executor intermeddling may be cited to take probate. When attached for disobedience.

Where one of several executors renounced after intermeddling, and probate was granted to his co-executors, the Court, on the application of the renunciant, declared his renunciation to be invalid (*l*).

The renunciation of an executor need not be under seal (*m*).

Need not be under seal.

The Court sometimes acts on an informal renunciation, provided it states in substance, if not in terms, that the executor has not intermeddled (*n*).

Informal renunciation.

The Court will not recognize an agreement by an executor to renounce (*o*), and an executor cannot renounce after he has once taken probate (*p*).

Agreement to renounce.

Cannot renounce after taking probate.

A renunciation of an executor is not complete until it has been filed in Court, and before that is done it may be retracted at any time (*q*); and even afterwards the Court has jurisdiction, in a proper case, to allow a retraction (*r*).

(*k*) *Mordaunt v. Clarke*, L. R., 1 P. & D. 592; 38 L. J., P. & M. 45; 19 L. T. 610.

114; 12 Jur., N. S. 344; 14 L. T. 23.

(*l*) *In the goods of Badenach*, 3 S. & T. 465; 33 L. J., P. & M. 179; 10 Jur., N. S. 521; 11 L. T. 275.

(*o*) *Hargreaves v. Wood*, 3 S. & T. 602; 32 L. J., P. & M. 8; 7 L. T. 338; 11 W. R. 31.

(*m*) *In the goods of Boyle*, 3 S. & T. 426; 33 L. J., P. & M. 109; 10 L. T. 541.

(*p*) *In the goods of Veiga*, 32 L. J., P. & M. 9; 11 W. R. 84.

(*n*) *In the goods of Gibson*, L. R., 1 P. & D. 105; 35 L. J., P. & M.

(*q*) *In the goods of Morant*, 3 L. J., P. & D. 151; 43 L. J., P. & M. 16; 30 L. T. 74.

(*r*) *In the goods of Bell*, 4 P. D. 85; 40 L. T. 659.

CHAPTER XI.

OF WHAT PROBATE GRANTED—WILLS AFFECTING REALTY
AND PERSONALTY—APPOINTING EXECUTOR ONLY—
HEIRLOOMS—CODICILS—SEVERAL INSTRUMENTS.

Wills affect-
ing realty and
personalty.

THE Probate Division, like its predecessor the Court of Probate, has, as we have seen, no jurisdiction to grant probate of a will affecting realty only.

Where, however, the will which regulates the disposition of the personalty regulates also that of the realty, the Probate Division may enquire into its validity, and grant or withhold probate, as it shall deem fit (*a*).

Court of
Probate Act,
1857 (20 & 21
Vict. c. 77),
sect. 61.

And by sect. 61 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77)—

“Where proceedings are taken under this Act for proving a will in solemn form, or revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for

Where a will
affecting real
estate is
proved in
solemn form,
or is the
subject of a
contentious
proceeding,

(*a*) See Wms. on Exors. 9th ed. pp. 326—328.

their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court.”

the heir and persons interested in the real estate to be cited.

But the Court has no power under this section to determine the validity of a will in respect of realty, unless the same will which regulates the disposition of the realty regulates also the disposition of the personalty (*b*).

But, “the bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved” (*c*).

Appointment of executor gives probate, right to.

Therefore, as a general rule, a will disposing of realty only, but containing an appointment of an executor, is entitled to probate, notwithstanding the renunciation of the executor (*d*).

And where freehold property is, by the doctrine of equitable conversion, to be considered as personalty, it is liable to probate and legacy duty, and a will disposing of it is entitled to probate (*e*).

When realty liable to probate duty.

But directions for the sale of real estate and payment of debts and legacies out of the proceeds are not sufficient to entitle a will to probate disposing of realty only, unless an executor be also appointed (*f*); neither is the will of a married woman made under a power entitled to probate if it dispose only of realty, even though it appoint an executor (*g*).

Will of real estate.

By married woman made under power.

But the will of a married woman dealing only with

Will of mar-

(*b*) *Campbell v. Lucy*, L. R., 2 P. & D. 209; 40 L. J., P. & M. 22; 24 L. T. 231; 19 W. R. 568.

(*c*) *Wms. on Exors.* 9th ed. p. 182.

(*d*) *In the goods of Jordan*, L. R., 1 P. & D. 555; 37 L. J., P. & M. 22; 16 W. R. 407. Similar grants made in Registry *John Smith*, January, 1862; *Eliza N. Gibson*, December, 1875.

(*e*) *In the goods of Gunn*, 9 P. D. 242; 53 L. J., P. D. & A. 107; 33 W. R. 169; 49 J. P. 72.

(*f*) *In the goods of Bootle*, L. R., 3 P. & D. 177; 43 L. J., P. & M. 41; 31 L. T. 273.

(*g*) *O'Dwyer v. Geare*, 1 S. & T. 463; 29 L. J., P. & M. 47; 5 Jur. N. S. 1366; *In the goods of Barden*, L. R., 1 P. & D. 325; *In the goods of Tomlinson*, 6 P. D. 209; 50 L. J., P. D. & A. 74; 46 L. T. 484; 30 W. R. 61; 46 J. P. 73; *In the goods of Hornbuckle*, 15 P. D. 149; 59 L. J., P. D. & A. 78; 63 L. T. 464; 39 W. R. 80.

ried woman
dealing with
realty only.

realty but appointing executors, is entitled to probate where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882 (*e*), or of property to which she is entitled as separate estate (*f*).

Heirlooms.

Heirlooms, being in the nature of realty, were excepted from the jurisdiction of the ordinary and his successor, the Probate Court. They are defined to be such goods and chattels as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor, such as deer in a real authorized park, fishes in a pond, doves in a dove-house, &c., charters, deeds, and other evidences of the land, together with the chests in which they are contained (though it seems the chest should be sealed). Also, by special custom in some places, carriages, utensils, and other household implements may be heirlooms, but the custom must be strictly proved. Monuments and tombstones in churches are heirlooms, though the owner of an heirloom may sell or dispose of it during his life, yet it seems he cannot devise them (*g*).

Of inoperative
codicil.

Although a testamentary document may be entirely inoperative in itself, yet an executor may be entitled to probate of it, and in some cases it may be desirable to prove such a paper, as where a codicil, conditioned to take effect only on an event which does not happen, republishes a will, and is on that ground entitled to probate (*h*); and

(*e*) *In the goods of Cubbon*, 11 P. D. 169; 55 L. J., P. D. & A. 77; 57 L. T. 37; 35 W. R. 200; 50 J. P. 744.

(*f*) *Brownrigg v. Pike*, 7 P. D. 61; 51 L. J., P. D. & A. 29; 46 L. T. 821; 30 W. R. 567; 46 J. P. 360. See also *In the goods of Hornbuckle*, *supra*, n. (*g*): and see as to form of grant of probate of will of married woman since 1882, *In the goods of Homfray*; *In the goods of Price*, *ante*, p. 57. See also as to

effect of wills of married women, *Kingdon*, *In re*, 32 Ch. Div. 604; 55 L. J. Ch. D. 598; 54 L. T. 753; 34 W. R. 634; *Duguid v. Fraser*, 31 Ch. Div. 449; 55 L. J. Ch. D. 285; 54 L. T. 70; 34 W. R. 267; *Smith*, *In re*, 45 Ch. Div. 632; 63 L. T. 448; 39 W. R. 93.

(*g*) See on this subject, Wms. on Exors. 9th ed. pp. 633—640.

(*h*) *In the goods of Da Silva*, 2 S. & T. 315; 30 L. J., P. & M. 171; 5 L. T. 140.

every codicil to a will must be proved with and in the same manner as the will, unless any such codicil or codicils are in litigation (*i*). Codicil must be proved with will.

But a will containing only an appointment of a guardian under 12 Car. 2, c. 24, s. 8, need not be proved (*j*).

Where a testator duly executed a testamentary paper commencing, "This is a codicil to any will or testament of me." No will being found, nor any evidence of any will ever having been executed obtainable, such paper was admitted to probate (*k*). Document purporting to be codicil to will not forthcoming.

So where a testator made his will and gave it to his son to keep. On his death the will was not forthcoming. Application for probate of codicil granted, it being held that the codicil not having been revoked by any mode indicated by the statute, it was entitled to be admitted to proof (*l*). Codicil proved without will.

A testator left a will and five codicils, all duly executed; the earliest of these codicils, dated March 25th, 1848, purported to be a second codicil to the will, and referred to and confirmed a first codicil; there was no evidence that any codicil had been executed before that of March 25th, 1848, but it appeared that in that month the solicitor of the testator had prepared a draft codicil and forwarded it to the deceased for execution, and that when he prepared the codicil of March 25th, 1848, he was under the erroneous impression that the draft codicil had been executed; after the testator's death the draft codicil was found tied up with the other testamentary papers; the Court refused to grant probate of the draft codicil, on the ground that it was not sufficiently identified as the paper referred to by the testator (*m*). Of codicils tied up with will.

(*i*) *In the goods of Roberts*, L. R., 3 P. & D. 110; 42 L. J., P. & M. 63; 26 L. T. 913; 21 W. R. 824.

(*j*) *In the goods of Morton*, 3 S. & T. 422; 32 L. J., P. & M. 174; 9 L. T. 300; 9 Jur., N. S. 728.

(*k*) *In the goods of Coulthard*, 11 Jur., N. S. 184.

(*l*) *In the goods of Savage*, L. R., 2 P. & D. 78; 39 L. J., P. & M. 25; 22 L. T. 375; 18 W. R. 766.

(*m*) *In the goods of Allnutt*, 3 S. & T. 167; 33 L. J., P. & M. 86; 9 Jur., N. S. 681. See also *In the goods of Dutton*, 3 S. & T. 66; 32 L. J., P. & M. 137; 8 L. T. 609; 11 W. R. 1063.

Will and
several
codicils.

Where a testator executed a will and three codicils, and subsequently executed a fourth codicil revoking the first three, and again subsequently a fifth, the Court granted probate of the will and the fourth and fifth codicils only, on being satisfied that the clause in the fifth codicil confirming those which had been previously revoked, was due to a clerical error on the part of the copying clerk (*k*).

Codicil
referring to
will not in
existence.

Where also a testator left a will dated and executed in 1854, and a codicil executed in 1856, which contained the following words, "I wish to add this codicil to the will I made in 1848," and it appeared that a draft will had been prepared in 1848 for his perusal, but there was no evidence that he had ever executed a will in that year, it was held that the reference in the codicil to a will made in 1848 was a mere misdescription, and the will executed in 1854, together with the codicil, was admitted to probate (*l*).

Misdescription.

And where a testator executed a testamentary paper purporting to be a codicil or appendix to her last will in the possession of one of her executors in London, of which will a copy was kept at Jerusalem, and such executor never had any will of the testatrix in his possession, but such a will had been executed in his office, and was in the possession of another executor who also resided in London, and a copy of it was found amongst the papers of the deceased at Jerusalem, both papers were admitted to probate (*m*).

Date mis-
recited in
codicil.
Practice.

Where the date of a codicil is misrecited in a subsequent codicil, affidavit explaining the error, if possible, and that search has been made for a codicil of the misrecited date, is required, and a marginal note is made in the engrossment of the codicil opposite the misrecital that an affidavit as to identity of the codicil referred to is filed (*n*).

(*k*) *In the goods of Thomson*, L. R., 1 P. & D. 8; 35 L. J., P. & M. 17; 11 Jur., N. S. 960.

(*l*) *In the goods of Houblon*, 11 Jur. N. S. 594.

(*m*) *In the goods of Cooper*, 8 Jur., N. S. 394. See also *In the goods of*

Law, 21 L. T. 209.

(*n*) *In the goods of Steele*, L. R., 1 P. & D. 575; 19 L. T. 91; *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J., P. & M. 49; 5 L. T. 719; 8 Jur., N. S. 391.

When a will and codicil have been in existence, and the will has been revoked, the Court will not grant probate of the codicil, unless it is satisfied that the testator intended it to operate separately from the will (*o*). But where a codicil, purporting to be a codicil to a revoked will, referred to a bequest not contained in the will but in a deed of gift, the Court admitted it to probate (*p*).

Of codicil to
revoked will.

Where a testator had executed a will in 1864, and another in 1865, revoking all former wills, and subsequently a codicil purporting to be a codicil to the will of 1864 and confirming it; the Court being satisfied that the date of the first will had been inserted by mistake for that of the last will, and there being nothing in the codicil itself showing an intention to revive the first will, granted probate of the second will together with the codicil (*q*).

A testatrix made a will and afterwards a codicil in the year 1876, and subsequently revoked the will and codicil by a will in 1877. Afterwards she wished to make a codicil to the will of 1877, but, by mistake, called it a codicil to her will of 1876. The Court held, that the mistake did not revive the will of 1876, and probate of will and codicil of 1877 were granted (*r*).

A testator left a will and six codicils. The will and first two codicils were in the possession of the executor in England. The other codicils were in India, and probate of them had been granted by the Court at Calcutta, but no exemplification (or authentic copies) of them had been sent to this country. It being for the benefit of the estate

(*o*) *In the goods of Greig*, L. R., 1 P. & D. 72; 35 L. J., P. & M. 113; 13 L. T. 680.

(*p*) *Black v. Jobling*, L. R., 1 P. & D. 685; 38 L. J., P. & M. 74; 21 L. T. 298; 17 W. R. 1108, followed in *Gardener v. Courthope*, 12 P. D. 14; 56 L. J., P. D. & A. 55; 57 L. T. 280; 35 W. R. 352;

50 J. P. 791.

(*q*) *In the goods of Anderson*, 39 L. J., P. & M. 55; 22 L. T. 308; see also *In the goods of Dent*, 31 L. T. 552; 23 W. R. 417.

(*r*) *In the goods of Ince*, 2 P. D. 111; 46 L. J., P. & M. 30; 36 L. T. 519; 25 W. R. 396.

Immediate grant to executors, where some of the testamentary papers in India.

that the executor in England should be at once qualified to act, the Court decreed to him probate of the will and two codicils in his possession, reserving power to him to prove the other codicils when they reached England, and he filing an undertaking to do so (*s*).

Codicil not so expressed.

In a case where a testator duly executed a paper which commenced, "I hereby make a free gift to," &c., the Court admitted parol evidence to explain his intention, and being satisfied therefrom that he intended the operation of such paper to be dependent on his death, granted probate of it as a codicil to his will (*t*).

Attestation clause no part of operative portion of codicil.

Where in the attestation clause of a third codicil it was stated by mistake that the first codicil had been cancelled, the Court held that an attestation clause formed no part of the operative portion of a codicil, and that all the three codicils must be admitted to probate (*u*).

Will proved abroad.

Where a will has been proved abroad, probate of any codicil thereto should be granted by the Court which granted probate of the will (*v*).

Will contained in several papers.

"The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing duly executed according to the statute; and as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers each so executed. Redundancy or repetition in such independent papers will no more vitiate any of them, than similar defects if appearing on the face of a single document" (*x*).

In such a case, the documents, whether they be two or

(*s*) *In the goods of Roberts*, L. R., 3 P. & D. 110; 42 L. J., P. & M. 63; 28 L. T. 913; 21 W. R. 824.

(*t*) *Robertson v. Smith*, L. R., 2 P. & D. 43; 39 L. J., P. & M. 41; 22 L. T. 417; see also *Green v. Tribe*, 9 Ch. D. 231; 47 L. J., Ch. 783; 38 L. T. 914; 27 W. R. 39; *Hubbard v. Alexander*, 3 Ch. D. 738; 45 L. J., Ch. 740; 35

L. T. 52; 24 W. R. 1058.

(*u*) *In the goods of Atkinson*, 8 P. D. 165; 52 L. J., P. D. & A. 80; 31 W. R. 660; 47 J. P. 440.

(*v*) *In the goods of Miller*, 8 P. D. 167; 52 L. J., P. D. & A. 93; 31 W. R. 956.

(*x*) *Per Lord Penzance, Lemage v. Goodban*, L. R., 1 P. & D. at p. 62.

more, are said to be admitted to probate "as together containing the last will of the deceased."

Will contained in several papers.

A testator duly executed on the same day three testamentary papers; by the first he disposed of certain property in Canada, and appointed executors; by the second he disposed of certain property in England, and appointed *other* executors; the third, which was substantially the same as the second, appointed no executors; probate was granted of the three papers, as together containing the last will of the deceased, to the executors named in the first and second papers (*y*).

Where a person executed on the same day three indentures described as deeds of gift, and it appeared from the contents of such documents that they were only to take effect after death, all three were admitted to probate (*z*).

Testamentary papers described as deeds of gift.

A married woman having a power to appoint by will under her marriage settlement, executed on the same day two instruments, the first purporting to be a deed of gift to her sister of all her property. The second, after reciting the contents of the first, expressed a wish that her sister should pay certain bequests out of the property. It being shown that the deceased had afterwards spoken of these papers as constituting her will, and that the property referred to in them had remained under her control up to her death, probate was granted of both (*a*).

Where the testator gave directions that his will should be copied with the omission of *one* clause, and, in making the copy, other portions of the will were by mistake omitted, and the imperfect copy was duly executed, and both instruments remained in the testator's possession until his death; the Court, being satisfied that the testator had executed the second instrument in the belief that it

Will imperfectly copied, parol evidence.

(*y*) *In the goods of Nickalls*, 4 S. 1022. & T. 40; 34 L. J., P. & M. 103.

(*a*) *In the goods of Webb*, 3 S. & T. 482; 33 L. J., P. & M. 182; (*z*) *In the goods of Morgan*, L. R., 1 P. & D. 214; 35 L. J., P. & M. 98; 15 L. T. 894; 14 W. R. 11 L. T. 277; 10 Jur., N. S. 709.

Will contained in several papers.

Limited to property in different places.

was an exact copy of the first with the omission of the erased clause, admitted both documents to probate (*b*).

And where a testator left two wills—one limited to property in England, the other to property in Tasmania, and he appointed different executors in each, the Court granted probate of both papers (*c*).

A testator executed a trust disposition and settlement valid according to the law of Scotland, and applicable to the whole heritable and movable estate which should belong to him at the time of his death. He subsequently executed his will, by which he disposed of all his real and personal estate, whether in Scotland or in England. By the law of Scotland, the English will was ineffectual as a conveyance of the Scotch heritage, and did not revoke the previous settlement. The Court granted probate of both documents (*d*).

English and foreign wills.

In *In the goods of Smart* (*e*), where there were two wills, one disposing of English and the other of Spanish property, the Court granted probate of the English will only, and allowed the foreign will to be delivered out of the registry for probate abroad.

In *In the goods of De la Rue* (*f*), where there was an English and a Swiss will, the Court granted probate of the English will only on a copy of the Swiss will being filed in the registry; and in *In the goods of Callaway* (*g*),

(*b*) *Birks v. Birks*, 4 S. & T. 23; 34 L. J., P. & M. 90; 13 L. T. 193; 13 W. R. 638.

(*c*) *In the goods of Harris*, L. R., 2 P. & D. 83; 39 L. J., P. & M. 48; 22 L. T. 630; 18 W. R. 901. See also *In the goods of Bolton*, 12 P. D. 202; 57 L. J., P. D. & A. 12; 36 W. R. 287.

(*d*) *In the goods of Donaldson*, L. R., 3 P. & D. 45; 42 L. J., P. & M. 19; 28 L. T. 477; 21 W. R. 549.

(*e*) 9 P. D. 64; 53 L. J., P. D. & A. 57; 32 W. R. 724; 48 J. P. 456.

(*f*) 15 P. D. 185; 63 L. T. 253; 39 W. R. 64.

(*g*) 15 P. D. 147; 59 L. J., P. D. & A. 73; 63 L. T. 227; 38 W. R. 528; following *In the goods of Astor*, 1 P. D. 150; 45 L. J., P. D. & A. 78; 34 L. T. 856; 24 W. R. 539. And see *In the goods of Cole*, 20 L. T. 758; *In the goods of Peabody*, 21 L. T. 730.

where there was an English and a South African will, the Court granted probate of the English will only, but ordered an affidavit to be filed in the registry exhibiting a copy of the South African will, and that a statement should be inserted in the probate to the effect that such affidavit had been filed.

Will contained
in several
papers.

Where a testator left two testamentary papers, and the bequests in the second were inconsistent with those in the first, and the second paper did not contain any appointment of executors, but neither did it revoke the appointment of executors contained in the first; the Court admitted both papers to probate (*h*).

Inconsistent
testamentary
papers.

And where a testatrix bequeathed certain legacies and the residue to her daughter absolutely, and appointed her sole executrix; and, by a later will, bequeathed the whole of her property to her daughter for life, and appointed her sole executrix, and, after her death, bequeathed legacies larger in amount than in the first will, but the second will contained neither a revocatory nor a residuary clause; both documents were admitted to probate (*i*).

And where a testatrix duly executed her will, and subsequently executed a paper, containing further legacies, by writing her name at the bottom of it in the presence of two witnesses, who wrote theirs on the back, and the second paper was pinned on to the first, the two papers were admitted to probate (*k*).

And where a testatrix, who was a widow, bequeathed by a will dated 25th of February, 1862, certain specified property (over which she had a power of appointment under

(*h*) *In the goods of Griffith*, L. R., 2 P. & D. 457; 26 L. T. 780; 20 W. R. 425; see also *In the goods of Lewis*, 25 L. T. 510; 19 W. R. 1038.

(*i*) *In the goods of Petchell*, L. R., 3 P. & D. 153; 43 L. J., P. & M. 22; 30 L. T. 74; 22 W. R. 353.

(*k*) *In the goods of Braddock*, L.

R., 1 P. D. 433; 45 L. J., P. & M. 96; 24 W. R. 1017; and see further *Robinson v. Clarke*, L. R., 2 P. & D. 269; 47 L. J., P. & M. 17; 39 L. T. 43 (where two all but inconsistent documents were admitted to probate by consent); and *In the goods of Rotton*, 35 L. T. 518.

Will contained in several papers.

her marriage settlement) between her four sons, and made the eldest son her sole executor, and by a later testamentary paper dated 28th of October, 1862, she left all the property of which she might die possessed between her three sons, and appointed a younger son sole executor; it was held that both papers ought to be included in the probate (*k*).

Erroneous reference by codicil to prior will.

In the case of *In the goods of Stedham* (*l*), the testator made a will in 1877 and another in 1878. In 1880 he executed a codicil intended to apply to the will of 1878, but which the solicitor who drew it framed by mistake so as to make it apply to the will of 1877.

In the goods of Stedham.
Judgment of Lord Hannen.

In giving judgment Lord Hannen said (*m*), "It is always extremely difficult to apply any principles of law to a gross blunder, but having given the case the best consideration I can, I have come to this conclusion, that the codicil thus referring to the will of 1877, so far confirms, and brings that will into existence, that it must form part of the probate in order that the codicil may have an interpretation put upon it, and that as the will of 1878 does contain also the most important of the testamentary dispositions which the testator has made, and which have never been revoked, the will of 1878 must also be admitted to probate.

"The three documents, therefore, the will of 1877, and the will of 1878, and the codicil, must all in their order of date be admitted to probate, and the general intent to be collected from the three instruments will then become the subject of consideration, if necessary, for a court of construction."

Two wills of different purport, no revocatory clause.

In a case where there were two wills of different purport, but the latter did not contain a revocatory clause, the Court granted probate of both documents, but as real estate was

(*k*) *In the goods of Graham*, 3 S. & T. 69; 32 L. J., P. & M. 113; 8 L. T. 610; 11 W. R. 638.

(*l*) 6 P. D. 205; 50 L. J., P. D. & A. 75; 45 L. T. 192; 29 W. R. 743; 46 J. P. 40.

(*m*) 6 P. D. at p. 206.

affected, ordered that the grant should not issue until notice had been served upon the heir at law (*n*).

Will contained in several papers. Probate in duplicate.

Where a testator executed two wills, one limited to property vested in him as trustee, the other dealing with his own real and personal estate, the Court directed that both wills should be included in one probate, but that the probate should be issued in duplicate (*o*).

In the following cases probate has been granted to one only of two testamentary papers:—Where two testamentary papers, similar in substance, but differing in language (one being clearly an amended copy of the other), were executed on the same day; the Court, in the absence of extraneous evidence as to which of them was executed first, acted on the internal evidence afforded by the papers themselves, and granted probate only of the one which appeared to be an amended copy of the other (*p*).

Probate granted to only one of two testamentary papers.

A testator made a will in 1831. A few years before his death he produced to two acquaintances a paper dated June 4th, 1847, which he alleged to be his will, and got one of them to make a copy of it. This paper was the same in substance as the will of 1831. It had his name and the names of two attesting witnesses at the bottom of it, but neither of the persons to whom it was shown could speak to any of the signatures. The copy which he signed in their presence was forthcoming, but the original document could not be found, and there being no positive evidence of its existence as a will, the Court granted probate of the will of 1831 (*q*).

A testatrix signed her will below the signatures of the attesting witnesses, but before they signed. She afterwards executed a codicil, but signed it after the witnesses

(*n*) *In the goods of Hartley*, 50 L. J., P. D. & A. 1; 29 W. R. 356.

(*o*) *In the goods of Claus*, 31 W. R. 924; 47 J. P. 663.

(*p*) *In the goods of Stephens*, 22 L. T. 727; 18 W. R. 528.

(*q*) *In the goods of Gray*, 39 L. J., P. & M. 42; 22 L. T. 489; 18 W. R. 900.

Will contained in several papers.

Probate granted of one only.

who attested it, though on the same occasion. The will was held entitled to probate, but the codicil was not (*r*).

Where a testamentary document did not in terms revoke a prior will, but disposed of the whole estate of the deceased, the Court rejected parol evidence to show that the latter was intended as a codicil to the former document on the ground that there was no such ambiguity in the second document, as would render necessary an explanation by parol evidence. The second document being unambiguous and dealing with the entire estate was alone admitted to probate (*s*).

The same where a testatrix executed a holograph will which did not in terms revoke a prior will, nor dispose of the residue specifically, but which did as a matter of fact deal with all the property belonging to the deceased (*t*).

(*r*) *In the goods of Hoskins*, 32 J., P. D. & A. 44.
L. J., P. & M. 158.

(*t*) *In the goods of Turnour*, 56

(*s*) *In the goods of Palmer*, 58 L. L. T. 671; 50 J. P. 344.

CHAPTER XII.

OF WHAT PROBATE GRANTED—INCORPORATION OF DOCUMENTS
—OMISSION OF WORDS FROM PROBATE—LOST WILLS.

It has been seen that probate is sometimes granted of more than one will, or of one will and codicil, and it will be further seen, on reference to the succeeding pages, that it often happens that documents referred to in a testamentary paper become incorporated with, and form part of, such testamentary paper, and as such obtain the probate of the Court.

Probate sometimes granted of more or less than actual testamentary paper.

For a will is not necessarily contained in the testamentary paper which is attested and signed, but may constitute as a part of itself other papers by mere reference.

On the other hand, as the Court grants probate only of the *will* of the deceased, it by no means follows that probate is granted of the whole paper, and that portions of the document, added by mistake, fraud, or the like, are left out, as forming no part of the testamentary intentions of the deceased.

By rule 12 of the Probate Rules, 1862 (non-contentious business), “If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document must be required, with a view to ascertain whether it be entitled to probate; and, if not produced, its non-production must be accounted for.”

Probate Rules (N. C. B.), r. 12.

And by rule 13, “No deed, paper, memorandum, or *Ibid.*, r. 13.

other document can form part of a will unless it was in existence at the time when the will was executed" (a).

Reference in
testamentary
paper to
unexecuted
paper.

Where there is reference, in a duly-executed testamentary instrument, to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence; and where an informal testamentary paper is incorporated with an instrument duly executed, the informality is cured, and the informal paper is rendered valid by the duly executed instrument (b).

Identity must
be clear.

But in order that an unattested paper may be adopted as part of a duly attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence, when necessary and properly admissible, leave no doubt as to its identity (c). And it must be so described in the will, as to leave no doubt in the mind of the Court that it is the paper writing referred to (d).

Declarations
of testator
or testatrix.

Declarations of intention by a testator or testatrix before the execution of a will, and his or her declarations subsequent to such execution, showing a belief that he or she had effected his or her intention, are admissible in evidence as showing what were the constituent parts of the will at the time of its execution (e).

Cases in
which docu-
ments have
been held to
be incorpo-
rated by a
duly executed
testamentary
paper.

In the following cases the Court held that documents referred to in a duly executed testamentary instrument were incorporated thereby:—

Where a married woman, having power under a settlement to make a will, made in 1851 a testamentary instrument in her own handwriting, which she intended to

(a) See also Rules for the District Registries, rr. 15, 16.

(b) *Allen v. Maddock*, 11 Moo. P. C. 427. See also *Norris, In re*, 14 W. R. 348.

(c) *Dickinson v. Stiddolph*, 11 C. B. N. S. 341.

(d) *In the goods of Brewis*, 3 S. & T. 473; 33 L. J., P. & M. 124; 10

Jur., N. S. 593. See also *Singleton v. Tomlinson*, 3 L. R., App. Cas. 404; 38 L. T. 653; 26 W. R. 722. See also *In the goods of Greves*, 1 S. & T. 250; 28 L. J., P. & M. 18; 7 W. R. 86.

(e) *Gould v. Lakes*, 6 P. D. 1; 49 L. J., P. D. & A. 59; 43 L. T. 382; 29 W. R. 155; 44 J. P. 698.

operate as a will, but which was not attested according to the requirements of 1 Vict. c. 26, s. 9; and in 1856 she duly executed a codicil, which was headed, "This is a codicil to my last will and testament:" this codicil contained no reference to the testamentary paper of 1851, which was not produced at the time the codicil was executed, but was found at her death in a trunk in her room in her residence, inclosed in a sealed envelope, on which was indorsed Mrs. Ann Foote's will; the codicil was found in a drawer in her bed-room, no other will or testamentary paper being found:—Held that the will of 1851 was incorporated by the codicil (*f*).

Documents held to be incorporated.

And it has been held that the words "ratify and confirm the indenture" are sufficient to incorporate an indenture recited and referred to in a codicil (*g*). And a will not duly executed devising real estate has been held good when confirmed by a subsequent codicil duly executed (*h*).

"Ratify and confirm the indenture."

Where a testatrix wrote a letter addressed to her nephew, in which she gave directions as to her funeral, and as to the distribution of her property, and signed it, but not in the presence of witnesses, and inclosed it in a sealed envelope; on a subsequent occasion, by the advice of A., the following words were written on the outside of the envelope, signed by the deceased and duly attested, "I confirm the contents written in the inclosed document in the presence of * * *" Held, on the Court being satisfied by evidence of the identity of the contents, that they were duly incorporated (*i*).

Letter inclosed in sealed envelope duly executed on outside.

Where the deceased executed a will on the first side of a sheet of paper; on the back of the will was a codicil to which the signatures of the deceased and two witnesses

Erroneous reference.

(*f*) *Allen v. Maddock*, 11 Moo. P. C. 427.

(*h*) *Utterton v. Robins*, 1 A. & E. 423.

(*g*) *Sheldon v. Sheldon*, 1 Robert. 81.

(*i*) *In the goods of Almosnino*, 1 S. & T. 508; 27 L. J., P. & M. 46; 6 Jur. N. S. 302.

Documents
held to be
incorporated.

were attached, but which had not been executed in accordance with the requirements of the statute; below this codicil, and partly on the third side of the sheet of paper, was another codicil duly executed: in this last document there was no other reference to the first codicil, than that a specific legacy given in such first codicil was revoked, the legatees named being misstated:—Held, that as there was a reference, although in erroneous terms, to the contents of the first codicil in the one duly executed and they were on the same paper, it was duly incorporated (*k*).

“Inventory
signed and
deposited
herewith.”

The deceased, by her will, gave to A. “all such articles “of silver plate and plated articles as are contained in the “inventory signed by me and deposited herewith;” a list of such articles, professedly the one referred to in the will, signed by the deceased at the foot of each page and at the end, but having on it a date on the last page later than the date of the will, was deposited with the will by the deceased at her bankers; in conversation with one of the attesting witnesses, the deceased referred to this list, but it was not shown to the witnesses at the time of the execution of the will; the deceased subsequently executed a codicil, which described itself as a codicil to the will of such a date, but did not confirm it in direct terms:—Held, that the will might be read as if it had been executed at the time of the execution of the codicil, and as the Court was satisfied from the language of the will so read, that the list referred to was then in existence, and from the other evidence that it had been before that date signed by the deceased and deposited with her will, it might be taken to be incorporated therewith (*l*).

Copy of will
referred to in
express terms.

Where the testator made his will in India, and deposited it with a bank at Calcutta; while temporarily resident in

(*k*) *In the goods of Widdrington*,
35 L. J., P. & M. 66; 14 L. T.
369; 14 W. R. 774.

(*l*) *In the goods of Lady Truro*,
L. R., 1 P. & D. 201; 35 L. J., P.
& M. 89; 14 L. T. 893; 14 W. R.
976.

Scotland he executed a codicil, in which he referred in distinct terms to a copy of the will, which he produced to the witnesses at the time he executed the codicil, and he deposited both papers in the hands of his executor:—Held, that the copy was incorporated by the codicil (*m*). Documents held to be incorporated.

Where a testator executed a will in France in 1858, and added to it a codicil in 1865, and a second codicil in 1872, and in 1860 he executed another will which he deposited with his bankers in England, and in it appointed executors and confirmed and renewed in all its parts the former will, although the will bearing date 1858 disposed only of his property in France, and the will of 1860 disposed only of his property in England, and both contained statements to the effect that they were independent of each other, the Court held that the French papers were incorporated by reference with the English will (*n*). Of foreign testamentary papers in English will.

Where a testator by his will dated the 22nd day of November, 1872, declared for the information of his trustees that the amount or values expressed in his ledger and entered on the 21st page, and signed by him and dated the 8th of November, 1872, were, and were the only, advancements either by way of gift or loan made by him to any of his children before the 8th of November, 1872, the Court held that the will must be read as if the entries in the ledger were incorporated into it, and that the entries were conclusive for the purposes of the will (*o*). Of entries in ledger.

A testatrix left a will revoking previous wills, and in which, after reciting that by two deeds of certain dates made in exercise of a power under her marriage settlement she had settled certain properties in a certain way, she confirmed the said deeds. No such deeds existed, but two testamentary papers similar in dates and substance Of testamentary papers described as deeds of settlement.

(*m*) *In the goods of Mercer*, L. R., 43 L. J., P. & M. 26; 30 L. T. 2 P. & D. 91; 39 L. J., P. & M. 768; 22 W. R. 711.

43; 23 L. T. 195; 18 W. R. 1040. (*o*) *Quihampton v. Going*, 24 W.

(*n*) *In the goods of Lord Howden*, R. 917.

Documents held to be incorporated.

Invalid will made during coverture by valid codicil made after marriage.

List of gifts.

One letter by another letter duly executed.

One sheet substituted for another.

were found:—Held, that the said two testamentary papers were incorporated by the will (*p*).

Where a married woman made a will which was invalid, and afterwards when a widow executed a document beginning with the words “*This is a codicil to the last will and testament of;*” the codicil was written on the same paper as the will and immediately after it, and it was proved she had no other will:—Held, that the will was incorporated in the codicil (*q*).

A testator in a codicil referred to one gift as being contained in a list of gifts deposited with his brother:—Held, that the whole list was incorporated (*r*).

A testatrix, the day before undergoing an operation which ended fatally, wrote two letters, one to a friend, the other to her executor. The former letter gave directions as to the disposal of certain articles of plate to which the testatrix had attached papers with the names of certain persons written upon them. The letter to the executor referred to the former letter, and was duly executed as a codicil:—Held, that the letter to the executor incorporated the former letter, which in its turn incorporated the papers therein referred to (*s*).

A will had been engrossed by a law stationer on eighteen brief sheets of paper, consecutively numbered. On the sixteenth sheet the testator had written a codicil, and on the eighteenth and last a schedule of property referred to in the will. On his death it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used by him in substitution of the fourth. The several sheets were tied together with tape:—Held, that the legal pre-

(*p*) *In the goods of Hastings*, 26 L. T. 715; 20 W. R. 616.

(*q*) *In the goods of Heathcote*, 6 P. D. 30; 50 L. J., P. D. & A. 42; 44 L. T. 280; 29 W. R. 356; 45 J. P. 361.

(*r*) *In the goods of Daniel*, 8 P. D. 14; 52 L. J., P. D. & A. 23; 48 L. T. 124; 31 W. R. 248; 46 J. P. 808.

(*s*) *Symes v. Appelbe*, 57 L. T. 599; 51 J. P. 632.

sumption that papers bound together and constituting the will, as found at his death, were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case (*t*).

In the following cases the Court held that the documents referred to were not incorporated:—

Where a duly executed codicil did not specifically refer to a memorandum written on the will below the signature:—Held, that such memorandum was not incorporated although the Court was satisfied that it was written on the will before execution (*u*).

G. executed a will, in which was the following bequest:—“I give to S. F. some household furniture which she have got a list of”; when the will was executed no such list was attached to it, nor did it appear that any was produced. S. F. deposed that on the deceased’s making a previous will, he told her that it was his intention to leave her some portion of his furniture, and that he had made a list thereof which he desired she would keep; that he then handed her a list, which remained in her possession till he made his last will when he desired her to keep it: and that the deceased never gave her any other list. The list referred to by S. F. commenced thus:—List goods I give to my godson, J. E. F.; and then specified divers articles: Held that the list produced was not incorporated in the will, its identity with that mentioned in the will not being sufficiently proved (*x*).

The duly-executed instrument must refer to the paper as then existing. For where a testatrix bequeathed personality to certain legatees “in the confidence that they will distribute it as I may by memorandum or deed, or otherwise, direct;” the Court refused to incorporate certain memoranda as to her wishes, which were found after her

Cases in which Court held documents referred to in a duly executed testamentary instrument to be not incorporated thereby.

Of memorandum written on will below testator’s signature.

List of articles not sufficiently identified.

Paper must be referred to as actually existing.

(*t*) *Rees v. Rees*, L. R., 3 P. & D. & T. 36.

84; 29 L. T. 375.

(*x*) *In the goods of Greaves*, 28 L.

(*u*) *In the goods of Willmott*, 1 S. J., P. & M. 18.

Documents held *not* to be incorporated.

Will executed on first page only.

death tied up with her will and codicil (*y*); and where a testamentary instrument was written on the first three pages of a sheet of paper; the portion on the first page only was duly executed, and the only reference it contained to any other paper was the following clause: "I bequeath the following sums to my sons and daughters hereunder named, and I declare the under-mentioned sons and daughters to be my executors;" no names were mentioned in the first page, but on the second and third pages there were unexecuted bequests and the names of sons and daughters:—Held that there was not a sufficient reference in the duly-executed portion of the paper to render parol evidence admissible for the purpose of incorporating in it the portion not executed (*z*).

Paper written on same day.

Where a will referred to a paper as not then existing, the Court refused to incorporate the paper with the will, although the paper and the will were written on the same day (*a*).

Paper must be operative.

Moreover, the document referred to must be such as actually to affect the operation of the will at law or in equity (*b*).

Identity insufficient.

A. inclosed and sealed up in an envelope two sheets of paper, on which she had in writing expressed her wishes as to the disposal of moneys belonging to her, and of her jewellery and other personal effects, but she did not execute either of these papers so as to make them testamentary. On the inner side of the envelope she wrote and duly executed a memorandum in the following words:—"It is my wish for my husband to administer the moneys, and for the smaller bequests B. will attend to them," and there was some evidence that, after the execution, two

(*y*) *In the goods of Lancaster*, 29 L. J., P. & M. 155.

(*z*) *In the goods of Watkins*, L. R., 1 P. & D. 19; 35 L. J., P. & M. 14; 13 L. T. 445; 12 Jur. N. S. 12.

(*a*) *In the goods of Yockey*, 29 L. T. 699.

(*b*) *In the goods of Ouchterlony*, 3 S. & T. 175; 32 L. J., P. & M. 140; 9 L. T. 117.

similar sheets of paper to those found therein were placed and sealed up in the envelope by A., but they could not be further identified:—Held, not incorporated (*c*). Documents held *not* to be incorporated.

Where a will contained the following clause, “I request my trinkets shall be divided as I shall direct in a small memorandum:” after the death of the deceased an unexecuted memorandum in her handwriting disposing of certain trinkets was found, and it appeared that this was in existence before the execution of a codicil, but it was not referred to by it:—Held, that the memorandum was not incorporated (*d*). Directions as to trinkets.

Mere inclosure in the same envelope is not sufficient; for where L. signed her name to a testamentary paper, but not in the presence of two witnesses, nor did she acknowledge her signature in their presence, and afterwards duly executed another paper, in which she nominated A. executor, and empowered him to draw her money, and employ it for her after her decease in all things necessary: the first paper was lying before her when she executed the latter, and she placed both of them in one envelope and delivered it to A., in whose possession it remained till the death of the deceased:—Held, that the first paper was not incorporated (*e*). Mere inclosure in same envelope.

The deceased in his will left an annuity to his wife, to “be paid out of the rents and other moneys received by my executors *as hereinafter named*, . . . and at her death the whole to be divided by my executors as hereinafter described”; no name of an executor was mentioned in the will, but beneath the signature of the deceased appeared a clause in his handwriting which contained the names of two persons as executors; there was direct evidence that this clause was written before the deceased Identity insufficient.

(*c*) *In the goods of Woods*, L. R., 8 L. T. 471; 11 W. R. 808; 9 Jur., 1 P. & D. 556; 37 L. J., P. & M. N. S. 630.

23; 17 L. T. 583; 16 W. R. 407. (*e*) *In the goods of Luke*, 34 L. J.,

(*d*) *In the goods of Matthias*, 3 S. P. & M. 105; 11 Jur., N. S. 397. & T. 100; 32 L. J., P. & M. 115;

Documents held *not* to be incorporated.

executed his will:—Held, that the proof was not sufficient to satisfy the Court that the clause below the signature was the very thing described by the words in the will relating to executors, and that it could not be incorporated (*f*).

Papers not described in the will as being in existence at time of execution.

A testatrix left the residue of her property to trustees, save and except such articles of furniture in her house at the time of her death “as may be ticketed, or may be described in a paper in my own handwriting, to show my intention regarding the same.” The testatrix, at the time she instructed her attorney to draw a will, produced to him two lists, which she informed him were the papers she intended to refer to, but they were not, at the time the will was executed, shown to the witnesses:—Held, that as the will did not describe the papers as being then in existence, the Court could not receive parol evidence of the fact, and could not allow them to be incorporated (*g*).

Identity insufficient.

Where a testatrix disposed of a portion of her property according to instructions contained in “any document or documents accompanying this my will,” and three letters were found with the will—(1) dated before, (2) dated before, but evidently altered after, (3) written after, the execution of the will: the Court held that none of the three were sufficiently identified to be incorporated with the will (*h*).

Where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of a document to which it refers, such document, although not in existence until after the execution of the will, is incorporated by force of

(*f*) *In the goods of Dallow*, L. R., 1 P. & D. 189; 35 L. J., P. & M. 81; 14 L. T. 573; 12 Jur., N. S. 492; 14 W. R. 902. See also *In the goods of Woods*, L. R., 1 P. & D. 556; 37 L. J., P. & M. 23; 17 L. T. 583; 16 W. R. 407; but see *In the goods of Greenwood*, (1892) P. 7; 61 L. J., P. D. & A., where

the words “executors” in the will and the clause were both marked with a X.

(*g*) *In the goods of Sunderland*, L. R., 1 P. & D. 198; 35 L. J., P. & M. 82; 14 L. T. 741; 14 W. R. 971.

(*h*) *In the goods of Sims*, 17 L. T. 619; 16 W. R. 407.

the codicil. But where the reference in the will was to a future document, and the language of the codicil in which the reference was repeated was ambiguous and might be read as pointing either to an existing or future document, the Court refused to incorporate unexecuted papers written by the testatrix between the date of the will and codicil (*i*).

Documents held *not* to be incorporated. Identity insufficient.

And it seems that a document containing the words, "*this is a third codicil to my will*," is not incorporated in a codicil of subsequent date by the words, "*this a fourth codicil to my will*" (*k*).

But in the subsequent case of *In the goods of Heathcote* (*l*), Lord Hannen said, "In the case of *Stockil v. Punshon*, it was of no importance which way the Court decided. I therefore did not consider the question of what extraneous evidence would be sufficient to connect the one document with the other, but I acted on the impression that the bare fact of enumeration was not sufficient to incorporate the second paper."

Stockil v. Punshon explained.

A., being ill in bed, sent for an attorney's clerk, to whom he gave verbal instructions for the preparation of his will; the clerk made a memorandum of part of them in his presence and trusted to memory for the remainder; before the will could be prepared, A. became suddenly worse, and he then executed a paper in which he desired that the "instructions given to the clerk" should be carried out:—Held, that the mere fact of the clerk writing in the presence of A. did not make the memorandum a written document of which A. had cognizance, and that it was not incorporated by the reference to the "instructions" in the paper (*m*).

Reference to instructions.

(*i*) *In the goods of Reid*, 38 L. J., 159.
P. & M. 1; 19 L. T. 265.

(*l*) 6 P. D. at p. 32.

(*k*) *Stockil v. Punshon*, 6 P. D.
9; 50 L. J., P. D. & A. 14; 44
L. T. 280; 29 W. R. 214; 45 J. P.

(*m*) *In the goods of Pascall*, L. R.,
1 P. & D. 606; 38 L. J., P. & M.
3; 19 L. T. 366.

Documents held *not* to be incorporated.

Witnesses signing on first sheet only.

“Written directions affixed to my will” not sufficient to incorporate revoked codicil affixed to will.

Schedule of property on fourth side of will executed on third side.

Where the deceased wrote out a list of legacies on three pieces of paper; the first was a sheet paged consecutively on the four sides and filled with writing; the second was also a sheet, but the writing only covered the first side, which was page five; the third was a half-sheet not paged; the first and third pages were dated with different dates; the second was not dated. On a day subsequent to the latest date on these papers the deceased signed her name in the presence of two witnesses at the foot of the writing on each piece of paper, but the witnesses by her direction only signed their names on the first sheet:—Held, that the other two pieces were not incorporated (*n*).

A testator executed a will in 1866, and a few days afterwards a codicil, which he called directions to his executors to form a part of his will, and in 1868 he executed a fresh will revoking all former wills and codicils. In this last will he expressed a wish that the goods and chattels in and about the rooms occupied by him at the time of his death should be disposed of according to the written directions left by him and affixed to his will, but no paper was found affixed to his will except the codicil above mentioned, which in many respects answered to the written directions described in the will, and which was found in his private room; it was held that it was not incorporated (*o*).

In another case a will commenced—“I direct my executors to pay the expenses of my funeral, and all my lawful debts out of the proceeds of my property,” and continued thus, “Whereas I am possessed of landed and chattel property, as stated in the annexed schedule.” The will was written on three sides of a sheet of paper, and the signature and attestation were at the bottom of the third side, but the schedule was on the fourth side in

(*n*) *In the goods of Pearse*, L. R., 1 P. & D. 382; 36 L. J., P. & M. 117; 16 L. T. 853. (*o*) *In the goods of Gill*, L. R., 2 P. & D. 6.

the handwriting and signed by the testator, and bearing the same date as the will. The witnesses who attested the will not having seen the schedule when they made their attestation, the Court held, that as the schedule was not proved to have been written at the time of the execution of the will, it could not be incorporated with the will (*p*).

Documents held *not* to be incorporated.

Where a testatrix made an unduly-executed testamentary disposition on the first three pages of a sheet of paper, and afterwards duly executed a testamentary disposition on the fourth page of the same sheet, but the latter disposition did not refer to the former, and the attesting witnesses were unable to say whether there was any writing on the paper at the time of the execution, except the signature of the testatrix: the Court held that the disposition on the first three pages of the sheet of paper was not incorporated in the document executed on the fourth page (*q*).

Duly executed disposition on fourth page not referring to unduly executed disposition on first three pages.

A testatrix duly executed her will in 1875, and (*inter alia*) bequeathed to trustees named in the will all her watches, jewellery, and other personal effects, "upon trust to deliver the same as soon as conveniently may be after my decease, to such of my children and issue as I shall, by any memorandum in writing purporting to dispose thereof, and signed by me, direct." She subsequently drew up a memorandum, putting the name of the beneficiary against each article, but she did not sign the document, and about two months later she executed a codicil which confirmed her will, except as altered by the codicil:—Held, that the memorandum, *not having been signed*, was incorporated in the will either by the terms of that document or by the subsequent execution of the codicil (*r*).

Unsigned memorandum.

The points deducible from the above cases seem to be:—
1st, the testamentary instrument must clearly describe the

Result of decisions.

(*p*) *Singleton v. Tomlinson*, 3 Ap. Cas. 404; 38 L. T. 653; 26 W. R. 722. P. & M. 63; 39 L. T. 235; 27 W. R. 140.

(*r*) *In the goods of McGregor*, 60

(*q*) *In the goods of Tovey*, 47 L. J., L. T. 840; 53 J. P. 231.

Result of decisions as to incorporation of documents.

document proposed to be incorporated, but the document may be *identified* by parol; 2nd, the testamentary instrument must describe it as *already existing*—if defective in this, the fact cannot be supplied by parol; 3rdly, when duly incorporated, the paper, however informal, becomes equally valid with the instrument with which it is incorporated, but it must be an *operative instrument*.

Probate of less than the whole document.

As the Court only grants probate of the *will* of the deceased, it does not necessarily follow that probate is granted of all the *writing* on the testamentary paper. Where a clause was introduced into the instructions for the will, by the express direction of the testator, but by the time it was added he was dead, Sir J. Nicholl struck out the clause, and the will was proved without it (*s*).

Clause introduced by fraud,

Where an old woman had nearly lost her eyesight, and the attorney who drew the will fraudulently inserted the residue to himself, and under different pretences kept the will back from the testatrix, the Court, on receiving parol evidence of the facts, ordered the clause as to the residue to be struck out (*t*).

or *per incuriam*.

Where a clause is introduced in a testamentary paper *per incuriam*, and the deceased executes the paper, not having given any instructions for, and being ignorant of the existence of such clause, it forms no part of the will of the deceased, and probate will be granted of the remainder of the paper omitting the clause (*u*). But in the absence of fraud, the execution of a will by a competent testator is conclusive evidence that he approved the contents thereof, if at the time of execution they were brought to his notice. A competent testatrix executed a codicil which had been previously read to her, containing a clause which the solicitor, who prepared the codicil, stated that he inserted inadvertently and without instruc-

Codicil written on deed by mistake.

(*s*) *Nathan v. Morse*, 3 Phillim. 529.

(*t*) *Barton v. Robins*, 3 Phillim. 455.

(*u*) *In the goods of Duane*, 2 S. & T. 590; 31 L. J., P. & M. 173; 6 L. T. 788; 8 Jur., N. S. 752.

tions from the testatrix:—Held, that the Court had no power to exclude the clause from the probate (x). Where, however, at the foot of a deed, to which the deceased was a party, but which disposed of no property after her death, the following document, duly executed as a will, was written:—"I do add unto my will this codicil, hereby revoking any other codicil or codicils heretofore made by me. I constitute and appoint my said son, A. G., a trustee under the deed, my sole and only trustee and administrator under my will." When the deceased executed this document, she said, pointing to the deed, "this is my will." Upon motion for a grant of probate of the deed and codicil to A. G., as executor:—Held, first, that the deed, as it was not of a testamentary nature, was not entitled to probate; secondly, that as there was no will, A. G. was not executor; thirdly, that as the codicil, though it disposed of no property, revoked other codicils, administration with it annexed should be granted to the next of kin (y).

Codicil executed at foot of deed that disposed of no property after death.

A residuary legatee, who was present at the execution of a will in which no executor was appointed, wrote her name, after the instrument had been signed by the testator and attesting witnesses, underneath the attestation clause, at the request of one of the witnesses:—Held, that the Court having to determine to whom the grant of administration, with the will annexed, should go, it was its duty to inquire in what character the legatee had signed the paper; and the Court being satisfied from the evidence that she had not signed the will as a witness, her signature was omitted from the grant; but the Court required, before making an order for the omission of her signature from the probate, that a notice

Signature of executor omitted from probate.

(x) *Guardhouse v. Blackburn*, L. R., 1 P. & D. 109; 35 L. J., P. & M. 116; 14 L. T. 69; 12 Jur., N. S. 278; 14 W. R. 463.

(y) *In the goods of Hubbard*, L. R., 1 P. & D. 53; 35 L. J., P. & M. 27. See *post*, Chap. XIV.

Signature of executor omitted from probate. to show cause should be served upon the next of kin (z).

Where B. made her will in the presence of C. and D., who subscribed the same; and subsequently E., an executor and legatee in the will, at the request of the testatrix, signed his name, to signify, as suggested, the acceptance of the executorship; the Court rejected a motion praying to omit E.'s name in the probate (a).

Omission and insertion of words by Court generally.

However clearly an error can be established in a will, unless words have been inserted by fraud or by mistake without the knowledge of the testator, the Court cannot correct it either by the omission of words or by the insertion of other words (b).

Words of revocation introduced *per incuriam*.

Where words of revocation had been introduced *per incuriam* and without instructions, and their presence there was unknown to the testatrix when she executed the will, they were omitted from the probate (c).

Reference by mistake to will not in existence.

And where a codicil referred to "the last will of me bearing date the 26th day of April, 1870," and no such will had ever existed, probate was granted of the codicil without such words and of the real last will of the testatrix, bearing date June 3rd, 1868 (d).

Offensive or libellous passages.

The Court will not exercise its power of omitting from the probate offensive or libellous passages in a will, except in cases of a very special and definite character. It, therefore, refused to omit from the probate a paragraph in a will which, though offensive, was not calculated to injure (e).

(z) *In the goods of Sharman*, L.R., 1 P. & D. 661; 38 L. J., P. & M. 47.

(a) *In the goods of Forrest*, 2 S. & T. 334; 31 L. J., P. & M. 200.

(b) *Harter v. Harter*, L. R., 3 P. & D. 11; 42 L. J., P. & M. 1; 27 L. T. 858; 21 W. R. 341.

(c) *In the goods of Oswald*, L. R., 3 P. & D. 162; 43 L. J., P. & M. 24; 30 L. T. 344.

(d) *In the goods of Dent*, 31 L. T. 552; 23 W. R. 417.

(e) *In the goods of Honeywood*, L. R., 2 P. & D. 251; 40 L. J., P. & M. 35; 25 L. T. 164; 19 W. R. 760.

For further information on this subject the reader is referred back to Chapter III. of this work.

The Court granted probate of the draft of a lost will, being satisfied by the evidence produced that it was in existence at the time of the death of the testatrix, and that it had been either suppressed or destroyed by the next of kin, who opposed the application for probate, and condemned the next of kin in costs (*f*). Lost wills.

But the Court will not grant probate of the contents of a lost will, unless there is very cogent evidence that such a will did exist, and that it was in existence at the time of the death of the testator (*g*).

It may now be taken to be a fixed rule of practice that the Court will not grant probate of a lost will on motion except with the consent of all parties interested in intestacy, nor will it always do so where such consent has been obtained (*h*). Probate of,
on motion.
Practice as to.

Probate will be granted of a codicil to a will, when the will cannot be found, if the Court is satisfied by the dispositions of the codicil that the testator intended that it should operate independently of the will (*i*). Of codicil to
lost will.

But the whole subject of lost wills received careful consideration in the case of *Sugden v. Lord St. Leonards* (*k*), decided in the year 1876, the result of which important decision, as far as it affects lost wills, may be shortly given as follows:— *Sugden v.*
St. Leonards.

The contents of a lost will, like those of any other instrument, may be proved by secondary evidence (*l*).

(*f*) *Podmore v. Wharton*, 3 S. & 9; 34 L. J., P. & M. 55.
T. 449; 33 L. J., P. & M. 143;
10 L. T. 754; 13 W. R. 106.

(*g*) *Wharram v. Wharram*, 3 S. & 113; 13 L. T. 681. See also
T. 301; 38 L. J., P. & M. 75; 10
Greenwood v. Cozens, 2 S. & T. 364;
L. T. 163; 10 Jur., N. S. 499; 12
5 Jur., N. S. 497.

(*h*) See *In the goods of Barber*, L. 45 L. J.,
R., 1 P. & D. 267; 36 L. J., P. & M. 1; on app., *ibid.* 49; 33
19; 15 L. T. 192; 15 W. R. 231; 24 W. R. 209; on app., *ibid.* 479.
and *In the goods of Body*, 4 S. & T. (*l*) *Brown v. Brown*, 8 E. & B.

Lost wills.

Declarations
of testator,
written or
oral, evidence
of contents.

Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents (*m*).

The contents of a lost will may be proved by a single witness, even though interested, whose veracity and competency are unimpeached (*n*).

When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved (*o*).

Sly v. Sly.

In the subsequent case of *Sly v. Sly*, it was held (following *Sugden v. Lord St. Leonards*), that declarations of a deceased person who had been in possession of property,

876; 27 L. J., Q. B. 173; 4 Jur., N. S. 163; *In the goods of Brown*, 1 S. & T. 32; 27 L. J., P. & M. 20; 4 Jur., N. S. 244, approved and followed.

(*m*) *Quick v. Quick*, 3 S. & T. 442; 33 L. J., P. & M. 146; 10 L. T. 619; 12 W. R. 1119; 10 Jur., N. S. 680, overruled.

(*n*) But see on this point, *Moore v. Whitehouse*, 3 S. & T. 567; 34 L. J., P. & M. 31; 11 L. T. 458.

(*o*) In addition to the last two cases the following were cited in *Sugden v. St. Leonards* on various points affecting lost wills, and the evidence admissible in support of them, and other lost and ambiguous instruments generally:—*Welsh v. Phillips*, 1 Moo. P. C. 299; *Patten v. Poulton*, 1 S. & T. 55; 27 L. J., P. & M. 41; 4 Jur., N. S. 341; *Cutto v. Gilbert*, 9 Moo. P. C. 131; *Wharram v. Wharram*, 3 S. & T. 301; 33 L. J., P. & M. 75; 10 L. T. 163; 12 W. R. 889; *Doe dem. Shallcross v. Palmer*, 16 Q. B. 747; 20 L. J., Q. B. 367; 15 Jur. 836; *Vallance v. Vallance*, 1 Hagg. 693;

Trevelyan v. Trevelyan, 1 Phill. 149; *Burls v. Burls*, L. R., 1 P. & D. 472; 36 L. J., P. & M. 125; 16 L. T. 677; 15 W. R. 1090; *Finch v. Finch*, L. R., 1 P. & D. 371; 36 L. J., P. & M. 78; 16 L. T. 268; 15 W. R. 797; *Davis v. Davis*, 2 Add. 223; *In the goods of Gardner*, 1 S. & T. 109; 27 L. J., P. & M. 55; *Foster v. Foster*, 1 Add. 462; *Martin v. Laking*, 1 Hagg. 244; *Knight v. Cooke*, 1 Lee, 413; *Keen v. Keen*, L. R., 3 P. & D. 105; 42 L. J., P. & M. 61; 29 L. T. 247; *Montefiore v. Montefiore*, 2 Add. 354; *Staines v. Stewart*, 2 S. & T. 320; 31 L. J., P. & M. 10; 8 Jur., N. S. 440; *Hill v. Wilson*, L. R., 8 Ch. 888; *Johnson v. Lyford*, L. R., 1 P. & D. 546; 37 L. J., P. & M. 65; 18 L. T. 769; 16 W. R. 1130; *In the goods of Sykes*, L. R., 3 P. & D. 26; 42 L. J., P. & M. 17; 28 L. T. 142; 21 W. R. 416; *In the goods of Ripley*, 1 S. & T. 68; 4 Jur., N. S. 342; *Doe v. Hiscocks*, 5 M. & W. 363; 2 H. & H. 54; 3 Jur. 955.

claiming a limited interest therein, under a particular will, were admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein (*p*). Lost wills.

The following are the exact words of the head-note to *Woodward v. Goulstone* (*q*), in which case *Sugden v. Lord St. Leonards* was commented on. "If a lost will is propounded for probate upon parol evidence alone, with evidence of a residuary bequest, but no sufficient evidence as to the rest of the will. *Quære*, whether probate ought to be granted of the residuary bequest alone, unless the Court is satisfied that it has before it substantially the testamentary intentions of the testator. *Quære*, also, whether post-testamentary declarations of the testator as to the contents are admissible in evidence." *Woodward v. Goulstone.*

In the very recent case of *Harris v. Knight* (*r*), the plaintiff propounded a non-existent document as the last will of her father, who died in 1877. At his funeral his wife produced a written paper in the form of a will, stating that it was the will of the deceased. By it she took a life interest in the property, which, after her death, was to be divided among children of her marriage with the testator. The document was subscribed with three names, one of which purported to be that of the deceased, written with his own hand. The other two names were the signatures of the attesting witnesses. The widow continued to occupy the freehold house and land where the deceased had lived (and which was the only property left by him) until her own death, which occurred in July, 1885. She never took any steps to prove what she had alleged to be the will of her late husband, and at her death the paper produced at the funeral was not forthcoming. The plaintiff propounded that document, and pleaded that, although it Probate of lost will granted after several years.

(*p*) L. R., 2 P. D. 91; 46 L. J., P. D. & A. 1; 55 L. T. 790; 35 P. & M. 63; 25 W. R. 463. W. R. 337; 51 J. P. 307.

(*q*) 11 App. Cas. 469; 56 L. J., (*r*) 15 P. D. 170; 62 L. T. 507.

had disappeared, the Court ought to grant a probate of it. No attempt had been made to show that the paper bore any date whatever, or that it contained an attestation clause to the names of the two witnesses. The Court below pronounced for the paper, the contents of which had been proved in the course of the trial:—Held, on appeal, that the decision was justifiable, having regard to the circumstances.

CHAPTER XIII.

OF WHAT PROBATE GRANTED—INTERLINEATIONS, ALTERATIONS, ERASURES, AND OBLITERATIONS (*a*).

By sect. 21 of the Wills Act (1 Vict. c. 26), it is enacted (*b*), “That no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.”

1 Vict. c. 26,
s. 21.
Obliterations,
interlinea-
tions, &c.

The words “shall not be apparent” mean “apparent on an inspection of the instrument itself,” and not “apparent by extrinsic evidence” (*c*). “*Shall not be apparent,*” meaning of.

(*a*) As to the effect of interlineations, alterations, erasures, and obliterations existing in wills executed previous to Jan. 1st, 1838, see Powles’s Browne on Probate (Lond. 1881), pp. 128, 129; and Wms. on Exors. 8th ed. Part I. Book II. ch. 3, sect. 1. See also *Swinton v. Bailey*, 1 Ex. D. 110; 4 App. Cas. 70; 48 L. J., Ex. 57; 39 L. T. 581; 27 W. R. 293.

(*b*) As to interlineations, &c., since passing of Wills Act, see Wms. on Exors. 9th ed. pp. 122 *et seq.*

(*c*) *Townley v. Watson*, 3 Curt. 761; *In the goods of M^cCabe*, L. R., 3 P. & D. 94; 42 L. J., P. & M. 79; 29 L. T. 25; *In the goods of Horsford*, L. R., 3 P. & D. 211; 44 L. J., P. & M. 9; 31 L. T. 553; 23 W. R. 211.

Interlineations, alterations, &c., Probate Rules (Non-Contentious Business), relating to.

The following are the rules (Probate Rules, Non-Contentious Business, 1862), applying to interlineations and alterations, erasures, and obliterations in testamentary instruments presented for probate (*d*):—

“R. 8. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

“R. 9. When interlineations or alterations appear in the will (unless duly executed, or recited in, or otherwise identified by, the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

Erasures and obliterations.

“R. 10. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.

Affidavit, when required.

“R. 11. In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.”

The effect of these rules is, that if the interlineations or alterations, erasures and obliterations have been made subsequently to the execution of the will, probate will be granted as though they did not exist; that is to say, they

will not appear on the face of the probate, except in three cases :—

When to appear on face of probate if made subsequent to execution. Initials.

1. Where the interlineations or alterations have themselves been afterwards executed and attested in the same way as the original will. (As a mark is sufficient execution, even though the testator can write, initials, if intended to represent the name, must be equally good. Therefore, where a testatrix, after execution and attestation, introduced certain interlineations into her will, but signed her initials in the margin, and the attesting witnesses did the same; the Court held that sufficient had been done to render the interlineations valid) (*e*) :

2. Where the will has been executed again subsequently to their having been made (in this case they can hardly be said to have been made subsequently to the execution of the will) :

Re-execution.

3. Where a codicil has been subsequently executed.

Codicil.

In all these cases the interlineations and alterations become a part of and incorporated with the will,—in fact, they are the will.

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink and in a different handwriting does not alone constitute an obliteration, interlineation or other alteration within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing; under such circumstances the burden of proof lies upon the party setting up such alteration to show that the words were inserted before execution, and that they had the sanction of the testator (*f*).

Words inserted in different ink or different handwriting.

Where erasures in a will are found after the death of a

(*e*) *In the goods of Blewitt*, 5 P. D. 116; 42 L. T. 329.

(*f*) *Greville v. Tylee*, 7 Moo. P. C. 320. See also *Williams v. Ash-ton*, 1 Johns. & H. 115.

Words erased and restored. testator, the Court can hear evidence to show under what circumstances they were made; and on proof of their having been made after the execution of the will, may order the original words to be restored (*g*).

Presumption as to alterations and erasures.

Where material alterations and erasures appear on the face of a testamentary paper, the existence of which at the time of the execution the attesting witnesses could not depose to; in the absence of all direct evidence as to the alterations and erasures, the presumption of law is that they were made after the execution of the will (*h*). And this presumption will not be rebutted merely by the fact that such alterations are dated in the handwriting of the testator, and bear a date earlier than that of the execution of the will (*i*), unless, indeed, by consent.

Probate of alterations, &c. by consent.

A testator wrote out his will in 1885, and signed and dated it, but did not have it attested: he subsequently destroyed all but the last sheet, and wrote out two fresh sheets, which he attached to the last sheet; he then, in 1888, inked over his signature in the presence of two attesting witnesses, who duly signed their names at the foot of the attestation clause. The testator died in 1889, and after his death the will was found with the name of the residuary legatee altered, and with several other alterations, all in the testator's own handwriting; there was no evidence as to when these were made, but as the next of kin and heir at law concurred in the application of the sole executor for probate, the Court admitted the will to proof (*k*).

(*g*) *Sturton v. Whillock*, 52 L. J., P. 29; 48 L. T. 237; 31 W. R. 382; 47 J. P. 232.

(*k*) *Cooper v. Bockett*, 4 Moo. P. C. 419; 10 Jur. 931. See also *In the goods of Cadge*, L. R., 1 P. & D. 543; 37 L. J., P. & M. 15; 17 L. T. 484; 16 W. R. 406; *In the goods of Sykes*, L. R., 3 P. & D. 26; 42 L. J., P. & M. 17; 28 L. T. 142; 21 W. R. 416; *Moore v.*

Moore, 6 Ir. Rep., Eq. 166, Prob.; *Doe dem. Shallcross v. Palmer*, 12 Q. B. 747; 20 L. J., Q. B. 369; 15 Jur. 836; *Doe dem. Tatum v. Catamore*, 16 Q. B. 747; *S. C. nom. Tatham v. Cattamore*, 20 L. J., Q. B. 264; *Rowley v. Merlin*, 6 Jur., N. S. 1165.

(*i*) *In the goods of Adamson*, L. R., 3 P. & D 253.

(*k*) *Maule v. Maule*, 62 L. T. 702.

Where some trifling alterations and interlineations appeared on the face of a holograph will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert that, in his opinion, they were written at the same time as the rest of the will, the Court admitted them to probate (*l*).

Trifling alterations in holograph will.

A testatrix duly executed a holograph will which after her decease was found with the word "one" written in the place of another word; there was no evidence to show when the alteration was made; the original word was quite illegible; it was held that it was the duty of the Court to decide what the obliterated word was, if from the evidence it was able to do so with "reasonable certainty," and in that event to admit the will to probate with the word so decided on in place of the word substituted for it by the testatrix (*m*).

One word substituted for another.

Where alterations and erasures appeared in the will of a soldier made whilst on military service; the Court held, that the presumption was that the alterations and erasures had been made during the continuance of such military service (*n*).

Alterations in will of soldier on actual military service.

Where a will seemed to have been first written in pencil and afterwards traced in ink, but not completely, words in some places being written in ink above, and apparently in substitution for the pencil writing, and in other parts the pencil writing standing alone, the Court declined to include the pencil writing in the grant (*o*).

Pencil writing traced over in ink.

Where a will was written on the first and third pages of several sheets of note paper, and at the bottom of one of these pages were the words and mark: "I leave the whole of my property to the following religious societies, viz., X to be divided in equal shares among them": on the top

Name of legatee on opposite page.

(*l*) *In the goods of Hindmarch*, L. R., 1 P. & D. 307; 35 L. J., P. & M. 24.

(*m*) *Jeffery v. The Cancer Hospital*, 57 L. T. 600; 51 J. P. 503.

(*n*) *In the goods of Tweedale*, L. R., 3 P. & D. 204; 44 L. J., P. & M. 35; 31 L. T. 799.

(*o*) *In the goods of Bellamy*, 14 W. R. 501.

Name of legatee on opposite page. of the opposite page was a similar mark to that following the "*viz.*," and the names of four religious societies: there being no evidence that the names of the societies were written before the execution of the will, the Court, considering them to be interlineations, excluded them from probate (*p*).

Bequest completed by indorsement. But where a will was written on the first side of a half-sheet of paper; and an unfinished bequest in the body of the will was completed on the back of the page, and the place where the indorsement was to be read into the will was marked by an asterisk: the attesting witnesses did not see the indorsement, but there was evidence that it was written before the execution of the will; it was ordered to be included in the probate (*q*).

Attestation of alterations. Where the clause appointing executors was written partly on the second and partly on the third side of a will; and subsequently the testator altered the clause, but his signature and those of the attesting witnesses appeared opposite only to the alterations, which were made on the second side, the Court granted probate of all the alterations (*r*).

Clause appointing executors written below attestation clause. In a very recent case, a will contained several allusions to "*my executors hereinafter named X (sic).*" At the end of the will, below the attestation clause, was written, "*X Executors, Wm. Greenwood and Wm. Sutcliffe (sic).*" The name "*William Sutcliffe*" was written on an erasure, under which some letters forming part of the name "*Charles Stanfield*" were distinctly visible. On evidence that the name "*Charles Stanfield*" had been erased and the name "*Wm. Sutcliffe*" substituted by the testator subsequent to execution, without any formal re-execution of the will: the Court ordered probate of the will with the clause

(*p*) *In the goods of White*, 30 L. J., P. & M. 55; 6 Jur., N. S. 808. See also *In the goods of Peach*, 1 S. & T. 138. P. & D. 214; 40 L. J., P. & M. 26; 24 L. T. 142; 19 W. R. 511.
 (*r*) *In the goods of Wilkinson*, 6 P. D. 100; 29 W. R. 896; 45 J. P. 716.

appointing executors incorporated therein, and that the name of "Wm. Sutcliffe" be omitted from the probate, and so much of the name "Charles Stanfield" as could be deciphered inserted therein (s).

Clause appointing executors written below attestation clause.

The meaning of the word "interlineation" in the Wills Act is not to be confined to something written between the lines. Something put into one of the lines, but written on the line, is equally an "interlineation" within the meaning of the Act (t).

Definition of "interlineation."

Where a will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged: they were apparently written with the same ink and at the same time as the rest of the will; but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see whether the interlineations were there or not: they were included in the probate (u).

Interlineations consisting of single words necessary to complete sentence.

And where a testator left a holograph will, one clause of which was unintelligible, but an unattested interlineation in his handwriting made the clause intelligible when taken with it, and also in accordance with declarations proved to have been made by him before the execution of the will: evidence having been given that the will was kept in a fastened-up envelope, and an expert having expressed his opinion that the interlineation was written at the same time and with the same pen and ink as the will, it was admitted to probate (x).

Clause unintelligible made clear by interlineation.

Where a testator on the 28th of April, 1847, executed a draft will, in which after his death were found interlineations and cancellations, some in ink and some in pencil; in May, 1847, he executed an engrossed will, and in 1854

Alterations previous to execution of codicil.

(s) *In the goods of Greenwood*, 1892 (P.) 7; 61 L. J., P. D. & A.

(u) *In the goods of Cudge*, L. R., 1 P. & D. 543; 37 L. J., P. & M.

(t) *Per Hannen, J.*, in *Bagshawe v. Canning*, 52 J. P. 583.

15; 17 L. T. 484; 16 W. R. 406.

(x) *In the goods of King*, 23 W. R. 552.

Alterations
previous to
execution of
codicil.

he executed a codicil which purported to be a codicil of the will of April, 1847; it appearing that the engrossed will was copied from the will of April, 1847, and that it corresponded with it as altered in ink, and consequently that the latter will was so altered before the date of the codicil, the Court granted probate of the will of April, 1847, as altered in ink, and of the codicil of 1854 (*y*).

So also, interlineations and alterations in a will were admitted to probate, where it was proved that they had been inserted before the date of the execution of a codicil to the will (*z*).

Interlineation
omitted from
probate.

But where a testatrix duly executed her will in the presence of two witnesses who subscribed and attested it, and immediately afterwards an omission was discovered in the will, which was supplied by an interlineation; and the testatrix approved of the will as altered, acknowledging it "as her last will and testament," and the witnesses then, in her presence, placed their initials in the margin opposite the interlineation: it was held that there had been no re-execution of the will, and that, consequently, the interlineation should be omitted from the probate (*a*).

Alteration;
unattested
will in testa-
tor's custody,
insufficient
explanation.

Where, on the testator's death, an alteration appeared in a will, which, during his lifetime, was in the custody of the writer (one of the executors), who swore such alteration was made with the testator's concurrence, but gave no further explanation and declined to propound the will so altered, the Court ordered probate of the will to issue in its original state: the residuary legatees on being cited to propound the will, or to show cause, &c., not appearing (*b*).

Testator and
witnesses

Where, some alterations having been made in a will

(*y*) *In the goods of Wyatt*, 2 S. & T. 494; 31 L. J., P. & M. 197; 6 L. T. 694; 10 W. R. 783.

(*z*) *Tyler v. Merchant Taylors' Company*, 15 P. D. 216; 60 L. J., P. D. & A. 86; 63 L. T. 779.

(*a*) *In the goods of Shearn*, 50 L. J., P. 15; 43 L. T. 736; 29 W. R. 445; 45 J. P. 308.

(*b*) *Parker v. Hickmot*, 1 Hagg. 211.

subsequent to execution, the testator and attesting witnesses traced their former signatures with a dry pen, and the attesting witnesses wrote their initials in the margin opposite each alteration: the Court held that these initials were no evidence of a due execution of the alterations, and refused to admit them to probate (*c*).

trace over signature with dry pen:—witnesses initial alterations.

A line drawn through with pencil is not an obliteration, but is merely regarded as something deliberative (*d*).

Alterations in pencil.

So where a testatrix executed her will on a printed form, and the blanks were filled up by her in her own handwriting partly with ink and partly with pencil; some portion of the writing in ink extended over that in pencil, and some words of the latter had been rubbed out and obliterated. The words in ink were sensible as read with the printed part of the will, and the attesting witnesses did not see the writing when they attested the will; it was held that the words in pencil were deliberative only and probate was granted without them (*e*).

Deliberative.

In another case, a testator executed a will and codicil, and at some time after the execution of the will, but before that of the codicil, he struck through with a pencil several paragraphs of his will, and made his initials on the margin, and also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter the will. The Court held, that the alterations so made were only deliberative and not final, and not being included in the confirmation of the codicil they ought to be omitted from probate (*f*).

Where a testatrix, after the execution of her will, erased

Erasure.

(*c*) *In the goods of Cunningham*, 29 L. J., P. & M. 71. See also *In the goods of Maddock*, L. R., 3 P. & D. 169; 43 L. J., P. D. & A. 169; 30 L. T. 696; 22 W. R. 741.

R. 897.

(*d*) *Francis v. Grover*, 5 Hare, 39. See also *In the goods of Hall*, L. R., 2 P. & D. 256; 40 L. J., P. & M. 37; 25 L. T. 384; 19 W.

(*e*) *In the goods of Adams*, L. R., 2 P. & D. 367; 41 L. J., P. & M. 31; 26 L. T. 526; 20 W. R. 400.

(*f*) *In the goods of Hall*, L. R., 2 P. & D. 256; 40 L. J., P. & M. 37; 25 L. T. 384; 19 W. R. 897.

Substituted
bequest.
Probate in
blank.

certain parts thereof, substituting in their places other words, probate was granted of the will with those parts erased in blank, the original words not being discernable on the face of the paper (*g*).

Conflict of
evidence.

Where a will was found in which a legacy was erased, but so as to be legible, and one of the attesting witnesses stated that the erasure was made before the execution of the will, the other witness having no recollection on the subject; and evidence was given tending to show that the erasure was made after execution; the Court, upon the balance of the evidence, being of opinion that the erasure was made after execution, granted probate, without the erasure (*h*). Declarations of a testator made after the execution of a will are admissible in evidence to show that an erasure was made after execution (*i*).

Declarations
of testator.

In a case where the testator made his will on a lithographed form, which he adapted to his purposes by filling up the blank space therein, and by making certain obliterations and interlineations which appeared in the body of the will, and the surviving witness could give no information as to whether or not the obliterations and interlineations were on the will when he attested it; but it appeared that the testator had made certain declarations as to his intentions before execution, and that, to give effect to these intentions, the alterations in question were necessary, the Court decreed probate of the will in its altered form (*k*).

Obliteration
of name after
execution.

Where the testator, after the execution of his will, obliterated the name of the executor, and substituted another, having previously expressed his intention so to do, and the alteration was not attested, the Court directed the original

(*g*) *In the goods of James*, 1 S. & T. 238.

(*h*) *In the goods of Hardy*, 30 L. J., P. & M. 142.

(*i*) *Gould v. Lakes*, 6 P. D. 1;

49 L. J., P. D. & A. 59; 43 L. T. 382; 29 W. R. 155; 44 J. P. 698.

(*k*) *Dench v. Dench*, L. R., 2 P. D. 60; 46 L. J., P. & M. 13; 25 W. R. 414.

name to be restored to the probate, having been satisfied what the original name was (*l*). Original name restored.

Where a piece of paper has been pasted by the testator over a whole legacy, on which paper, at some time, about which the witnesses can give no information, he has written a new bequest, the Court will not order the upper paper to be removed, and will direct the probate to issue in blank as to that legacy; but if the testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the Court will consider it a case which comes under the principle of a dependent relative revocation, and will endeavour to discover the amount of the legacy originally bequeathed by removing the upper paper (*m*). Piece of paper pasted over legacy.

Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the attesting witness's name had been erased by the testator, and had at his request been re-written by the attesting witness, the Court on motion granted probate to the widow on affidavits that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children (*n*). Name of attesting witness written on erasure.

A testator in the beginning of his will disposed of certain leasehold houses in trust for the benefit of his children. The words of the description of one of these houses were struck through by a pen, and the testator's signature (but not those of the witnesses) was placed near this alteration. At the end of the will a clause was interlined, by which he bequeathed the same house to his trustees for the sole benefit of his wife, and under the signatures of the testator Memorandum referring to alterations.

(*l*) *In the goods of Harris*, 1 S. & T. 536; 29 L. J., P. & M. 79. See also *In the goods of Greenwood*, ante, p. 163, n. (*s*).

(*m*) *In the goods of Horsford*, L. R., 3 P. & D. 211; 44 L. J., P. & M. 9; 31 L. T. 533; 23 W. R. 211. See also *In the goods of*

M'Cabe, L. R., 3 P. & D. 94; 42 L. J., P. & M. 79; 29 L. T. 249; *In the goods of Farr*, 29 L. J., P. & M. 70; 6 Jur., N. S. 56.

(*n*) *In the goods of Coleman*, 2 S. & T. 314; 30 L. J., P. & M. 170; 5 L. T. 119.

Memorandum
referring to
alterations.

and the witnesses at the termination of the will a memorandum was added, to the effect that the words above were struck out for the benefit of his wife, and this memorandum was signed by the testator and attested by the witnesses. The Court held that the memorandum referred to both alterations—the obliteration and the interlineation—and that the will so altered ought to be admitted to probate (*o*).

Probate in
fac-simile.

The Court is sometimes unable to distinguish how much of the alleged writing constitutes the actual will of the deceased. In such cases it is usual to allow the probate to be drawn in the form exactly similar to the alleged writing, in what is called *fac-simile*. As where a will, on the face of it, had been executed in 1858, and subscribed by two legatees named in it as witnesses, and was re-executed in 1860, and attested by different witnesses, and after the death of the testatrix was found with the first attestation clause and the names of the witnesses to it cancelled, but there was no evidence to show the date of the cancellation: the Court refused to exclude the part cancelled from probate, and directed the probate to go in *fac-simile* (*p*).

Again, where a testator executed his will and a codicil thereto in the presence of three witnesses, two of whom subscribed their names as such to both instruments; immediately afterwards, before any person had left the room, the testator having been informed that one of such subscribed witnesses would forfeit her interest under the will, ordered her name to be struck through, and the third witness to sign the will and codicil, which was done:—Held that the Court could not allow the probate to issue with the omission of the name struck through, but might permit it to be taken in *fac-simile* (*q*).

(*o*) *In the goods of Treeby*, L. R., 11 L. T. 684; 10 Jur., N. S. 3 P. & D. 242; 44 L. J., P. & M. 1243.
44.

(*p*) *In the goods of Smith*, 3 S. & J., P. & M. 125; 11 Jur., N. S. T. 589; 34 L. J., P. & M. 19; 587.
(*q*) *In the goods of Raine*, 34 L.

CHAPTER XIV.

OF ADMINISTRATION WITH THE WILL ANNEXED.

As we have already seen, administration with the will annexed is granted where there is a will: but for one or other of the reasons specified there is no executor available to take a grant of probate (*a*). When granted.

The office of an administrator with the will annexed differs little from that of an executor, except in one important particular, namely, that an administrator with the will annexed has to give security for the faithful discharge of his duties, from which condition an executor, being the person appointed by the deceased himself to take charge of his estate, is exempt.

The first provision for such a mode of administration is to be found in 21 Hen. VIII. c. 5, s. 3, which provides that, whenever any person die intestate or "the executors named in any testament refuse to prove the said testament, then the ordinary or other person or persons having authority to take probate of testaments . . . shall grant the administration of the goods of the testator or person deceased to the widow of the same person deceased, or the next of his kin, or to both, as to the discretion of the same ordinary shall be thought good." 21 Hen. VIII.
c. 5, s. 3.

This statute provides only for the case of an executor refusing to prove, and therefore many of the cases above contemplated are outside its provisions. "Consequently, in such instances the Court is left to the exercise of its own Majority of
interest preferred.

(*a*) *Ante*, p. 103.

21 Hen. VIII. discretion in the choice of an administrator according to its own practice" (c).
 c. 5, s. 3.

Majority
of interest
preferred.

But the Court pays deference to the wishes of the deceased, not only in carrying them out as expressed in his will, but also in confiding the duty of administering his effects to the person selected by him. It was therefore the practice of the Ecclesiastical Courts, and is the present practice of the Probate Division, in all cases, whether within the statute or not (except under peculiar circumstances), to consider which of the claimants to *administration with the will annexed* has the greatest interest in the effects of the deceased, and to prefer such person to the widow or next of kin in spite of the provisions of 21 Hen. VIII. c. 5, s. 3.

Will of married woman.

Even when a married woman makes a will and does not appoint an executor, the Court following out its principle will grant *administration with the will annexed* to the persons having the greatest interest in preference to her husband (d).

So where a wife left property to a woman married in America, the Court refused to make a grant to her husband without proof of her consent (e).

Residuary
legatee preferred.

It follows, therefore, that if there be a bequest of the residue in a will, the Court will prefer the residuary legatee, in granting *administration with the will annexed*, to the widow or next of kin, and even to legatees. And this is so even when there is no prospect of any residue, and although the claimant be merely residuary legatee in trust (f).

"However, the next of kin has a *prima facie* right, and therefore, where a party claims as, or derivatively from, a residuary legatee, the burden of proof lies on such party. Hence, where the husband appointed his wife executrix

(c) Wms. on Exors. 9th ed. p. 400.

In the goods of Reay, 4 S. & T. 215.

(d) *In the goods of Bailey*, 2 S. & T. 135; 30 L. J., P. & M. 190; 4 L. T. 90; 9 W. R. 540. See also

(e) *In the goods of Williams*, 17 L. T. 518.

(f) See Wms. on Exors. 9th ed. pp. 400, 401.

and residuary legatee, and he and his wife were drowned in the same ship, the Court granted administration to the next of kin of her husband, on the ground that the next of kin of the wife had not proved her survivorship" (g).

Next of kin has *primâ facie* right.

Where the residuary legatee survives the testator, and has a beneficial interest, his representative has the same right to *administration with the will annexed* as the residuary legatee himself, and is preferred to the next of kin or to legatees; but if the residuary legatee be merely so in trust, then the administration will go to those having the beneficial interest in the estate (h).

Representative of deceased residuary legatee.

If there be no residuary clause, or if the residuary legatee decline, or from any other cause does not obtain the grant, then the right to *administration with the will annexed* naturally falls to the widow or next of kin; but if they have no interest in the effects, or *à fortiori*, if they refuse the grant, the Court may make it to any one interested in the estate, such as a legatee or a creditor (i).

In default of residuary legatee, who entitled.

So the Court made a grant of administration with the will annexed as a creditor to a person who had undertaken the funeral at the request of the universal legatee (k), and the Court will make the grant to new trustees appointed by the Court of Chancery (l).

Grant to creditor or trustees.

Where the Court considers an appointment of trustees insufficient to entitle them to probate as executors accord-

(g) Wms. on Exors. 9th ed. p. 402.

(h) *Ibid.* pp. 402, 403. See also *In the goods of Ditchfield*, L. R., 2 P. & D. 152; 23 L. T. 325; 18 W. R. 1144; and for a case where administration with the will annexed was granted to executors who had renounced as residuary legatees in trust, see *In the goods of Bennett*, 6 Jur., N. S. 326, n.

(i) See Wms. on Exors. 9th ed. pp. 403, 404. See also *West v. Willby*, 3 Phill. 381; *Mayhew v.*

Newstead, 1 Curt. 593; *Furlonger v. Cox*, cited 3 Phill. 381; *In the goods of Waters*, 2 Rob. 142; 7 No. of Cas. Ecc. 380; *Kooystra v. Buyskes*, 3 Phill. 531; *In the goods of Hinckley*, 1 Hagg. 477; *Snape v. Webb*, 2 Cas. temp. Lee, 411.

(k) *Newcome v. Beloe*, L. R., 1 P. & D. 314; 36 L. J., P. & M. 37; 16 L. T. 33.

(l) *In the goods of Woodfall*, L. R., 3 P. & D. 108; 42 L. J., P. & M. 64; 29 L. T. 248.

To guardian
of minor
universal
legatee.

ing to the tenor, it made a grant of administration with the will annexed to the guardian of a minor universal legatee (*m*); also by consent to the committee of the person of a lunatic executrix, instead of the committee of her estate (*n*); and to the next of kin, the executor having renounced, where the estate consisted of realty only (*o*).

To trust in
preference to
nominee of
next of kin.

Where a husband left his wife a life interest in his whole property which was at her death to be sold and divided among his children, and he appointed his eldest son and another person to carry such division into effect. The widow took probate of the will, and subsequently sold the property of her husband for 600*l.*, and with that sum, and 130*l.* of her own money, purchased two leasehold houses. On her death the Court granted administration of her effects to the eldest son, the trustee named in their father's will, in preference to the nominee of the other next of kin, five in number (*p*).

To widow.

Where a testator left his property to his widow absolutely, and in a subsequent clause of his will left her only a life interest, the Court ordered a special grant, reciting the two clauses, and authorizing the widow to take administration with the will annexed (*q*).

Executor and
legatee both
drowned at
same time.

Where the executor and the residuary legatee were both drowned at the same time, the Court made a grant of administration with the will annexed to the widow of the testator (*r*).

Where an executor named in a will is a corporation aggregate, administration with the will annexed will be

(*m*) *In the goods of Cozens*, 16 L. T. 208; 15 W. R. 532.

(*n*) *In the goods of Scarlett*, 27 L. T. 215; 21 W. R. 79.

(*o*) *In the goods of Jordan*, L. R., 1 P. & D. 555; 37 L. J., P. & M. 22; 16 W. R. 407.

(*p*) *In the goods of Stainton*, L.

R., 2 P. & D. 212; 40 L. J., P. & M. 25; 24 L. T. 320; 19 W. R. 567.

(*q*) *In the goods of Westropp*, 5 Jur., N. S. 1318.

(*r*) *In the goods of Carmichael*, 4 S. & T. 424; 32 L. J., P. & M. 70; 11 W. R. 462.

granted to its syndic, *i.e.*, a person appointed by the corporation for that purpose (*s*).

To nominee of corporation appointed executor.

Where an Englishman domiciled abroad died abroad, leaving a will dealing with property in this country, the Court granted administration with the will annexed to the attorney of the person who had been appointed his personal representative by the Court of his domicile (*t*).

To attorney of personal representative appointed by Court of domicile.

Isle of Man.

In the Isle of Man officers called "sumners" are appointed in each parish by the bishop, whose duty it is to take upon themselves grants of administration with the wills annexed, in the event of executors refusing to act, or being unable to give security to the Ecclesiastical Court of the diocese. A. died in the Isle of Man, leaving a will, whereof he appointed executors. The executors being unable to give security to the Ecclesiastical Court of the diocese, administration with the will annexed was granted to B., sumner for the parish in which A. died. The executors having been cited, and not appearing, the Court, upon an affidavit as to the circumstances under which the grant was made to B., and upon B.'s consent being filed in the registry, granted administration with the will annexed to the residuary legatee (*u*).

In a contest for administration with the will annexed, the Court preferred the sister of the testator to the widow, as it appeared that the sister, as a legatee, had a larger interest in the property to be administered (*x*).

Sister of testator preferred to widow.

Where there was no clear disposition of the residue and the executors renounced probate, the Court made the grant to the next of kin, accompanied by a memorandum to the effect that the will contained no clear disposition of the residue (*y*).

No clear disposition of residue.

(*s*) *In the goods of Darke*, 1 S. & T. 516; 26 L. J., P. & M. 71; 2 L. T. 24; 8 W. R. 273.

& T. 318; nom. *Cubbon v. Steele*, 30 L. J., P. & M. 192; 5 L. T. 140.

(*t*) *In the goods of Rule*, 4 P. D. 76; 47 L. J., P. D. & A. 32; 39 L. T. 123; 26 W. R. 357.

(*x*) *In the goods of Homan*, 9 P. D. 61; 52 L. J., P. 94; 31 W. R. 955.

(*u*) *In the goods of Whiston*, 2 S.

(*y*) *In the goods of Aston*, 6 P.

To husband
as creditor of
his wife.

The Court made a grant to a husband as a creditor of his wife's estate, although he had renounced his right as residuary legatee (z).

To guardian
elected by
minor
universal
legatee.

The next-of-kin of a minor, the universal legatee, were an uncle who was abroad, an aunt who was in poor circumstances, and another aunt who had renounced. The Court granted administration with the will annexed for the use and benefit of the minor to a guardian elected by her (a).

Without
notice to
next of kin.

Where upon an application for administration with will annexed it appeared that the testator's children were minors, the Court granted administration to a stranger in blood, elected by the children as their testamentary guardian, without notice to the next-of-kin entitled to the grant, on proof that one had renounced and that the remainder were at a distance, or that their place of residence was unknown (b).

Executrix
disappearing
taking will
with her.

Where the executrix and universal legatee of a will disappeared taking the will with her, the Court refused to grant administration with the will annexed until the executrix had been first cited by advertisement (c).

Sole legatee.

Where a sole legatee applied for a grant of administration with the will annexed on an affidavit that the deceased was possessed of no other property than that described in the will, the Court required the next of kin to be cited before making the grant (d).

No obligation
on Court to
make grant in

It must always be remembered that it is not obligatory on the Court to grant *administration with the will annexed* to the residuary legatee; and, under the old practice, a

D. 203; 50 L. J., P. D. & A. 77;
30 W. R. 92.

(z) *In the goods of Biggs*, L. R., 1
P. & D. 595; 37 L. J., P. & M.
79. See also *In the goods of Blisset*,
44 L. T. 816.

(a) *In the goods of Gardiner*, 9
P. D. 66; 53 L. J., P. D. & A. 31;
32 W. R. 756; 48 J. P. 456.

(b) *In the goods of Webb*, 13 P.
D. 71; 57 L. J., P. D. & A. 36;
58 L. T. 683; 36 W. R. 847; 52
J. P. 231.

(c) *In the goods of Wormington*,
16 L. T. 208.

(d) *In the goods of Watson*, 1 S.
& T. 110; 27 L. J., P. & M. 7.

mandamus was not granted to compel the Ecclesiastical Court to adopt such a course, unless, indeed, where the same person was residuary legatee and next of kin (*e*).

favour of
residuary
legatee.

It should be observed that the mere consent of an executor is not sufficient to entitle the residuary legatee to a grant of administration with the will annexed (*f*).

Mere con-
sent of exe-
cutor not
sufficient to
entitle resi-
duary legatee
to grant.
Residuary
legatee for
life.

When there is a residuary legatee for life, and a legatee substituted, the usual course is to grant *administration with the will annexed* to the legatee for life; but the Court will not adopt this course, if by doing so it would involve the determination of a difficult point in the construction of a will (*g*).

Where a testator appointed an executor that no one had ever heard of, and who could not be discovered, the Court granted administration with the will annexed to one of the residuary legatees (*h*); and, where the names of the intended executors were left in blank, and there was an uncertainty as to the residuary bequest, the Court made a similar grant to the widow of the testator (*i*).

Executor not
known.

Names of
intended
executors in
blank.

Where the plaintiff and defendant were both residuary legatees of a will which had been propounded and established by the plaintiff, the Court made a grant of *administration with the will annexed* to the plaintiff in preference to the defendant (*k*).

Plaintiff and
defendant in
probate action
both residuary
legatees.

And the Court will make a grant of administration with the will annexed to a universal legatee in trust only, having no beneficial interest in the property (*l*).

Universal
legatee in
trust only.

(*e*) See Wms. on Exors. 9th ed. p. 403.

(*f*) *Garrard v. Garrard*, L. R., 2 P. & D. 238; 25 L. T. 162; 19 W. R. 569.

(*g*) *Brown v. Nicholls*, 2 Robert. 399; see also *In the goods of Morrison*, 2 S. & T. 129; 3 L. T. 786; 9 W. R. 518.

(*h*) *In the goods of Sawtell*, 2 S. & T. 448; 31 L. J., P. & M. 65.

(*i*) *In the goods of Pool*, L. R., 1 P. & D. 206; 35 L. J., P. & M. 97.

(*k*) *Podmore v. Whatton*, 3 S. & T. 449; 33 L. J., P. & M. 143; 10 L. T. 754; 10 Jur., N. S. 756; see also *Sawbridge v. Hill*, L. R., 2 P. & D. 219; 40 L. J., P. & M. 27; 24 L. T. 320; 19 W. R. 705.

(*l*) *In the goods of Ford*, 23 L. T. 323; 18 W. R. 960.

Universal
legatee en-
titled to ad-
ministration
with the will
annexed.

Words held
to constitute
beneficiaries
residuary
legatees.

A universal legatee, on the other hand, is entitled to a grant of administration with the will annexed, though not to probate (*m*).

The following words have been held to constitute the beneficiaries universal legatees:—"I leave all the property and effects possessed by me at the time of my decease to my dear wife" (*n*).

"All the property I may be possessed of at my death" (*o*).

All my personal effects, and everything of every kind "that I have now or may have at the time of my decease, at my apartments at A. or elsewhere" (*p*).

And, on the evidence of French advocates, the following words in a holograph will were held to constitute the beneficiary universal legatee for all property in England as well as in France:—"J'institue pour ma légataire universelle Madame A., . . . etc^a pour lui donner une preuve de ma reconnaissance des bons soins qu'elle a eus pour moi en France le tout sans rien excepter, et notamment pour tous les effets mobiliers, et tous les biens meubles que je possède en France" (*q*).

A gift to a legatee of the remainder of money, goods, and debts due to the testator, after payment of debts, &c., constitutes him residuary legatee (*r*).

The words "*to my legal heirs and theirs for ever*" (even where the testator was an illiterate man who might have been supposed to have used the words in their conventional, rather than their technical, sense), were held to constitute

(*m*) *In the goods of Oliphant*, 1 S. & T. 525; 30 L. J., P. & M. 82; 6 Jur., N. S. 256.

(*n*) *Ibid.*

(*o*) *In the goods of Goodyar*, 1 S. & T. 127; 4 Jur., N. S. 1243.

(*p*) *In the goods of Scarborough*, 6 Jur., N. S. 1166; 9 W. R. 149.

(*q*) *Lauenville v. Anderson*, 2 S. & T. 24; 30 L. J., P. & M. 25; 6 Jur., N. S. 1260; 3 L. T. 304; 9

W. R. 74.

(*r*) *In the goods of Bloomfield*, 31 L. J., P. & M. 119,—citing *Kendall v. Kendall*, 4 Russ. Ch. Ca. 360; *Timewell v. Perkins*, 2 Atk. 102; *Rawlings v. Jennings*, 13 Ves. 39; *Lamphier v. Despard*, 2 Dru. & W. 59; *Avison v. Simpson*, 1 John. 46. See also *In the goods of Shepherd*, 41 L. T. 530.

the heir-at-law residuary legatee of the personalty as well as the realty, there being a mixed fund of real and personal estate (s).

Words held to constitute beneficiaries residuary legatees.

“What is left, my books and furniture, and all other things,” are words sufficiently comprehensive to cover the general residue (t).

The question, what words will constitute a residuary legatee was before the Probate Division as recently as June 9, 1891. In that case (u) a testator bequeathed to his wife “all my furniture, jewellery, pictures, wearing apparel, and other effects belonging to me at the time of my decease.” The will went on to make specific bequests to his wife of money, shares, securities, &c., and it directed her to pay his debts, and left it to her discretion whether she would provide for certain members of his family. It contained no bequests to any other person. The Court held that the words “other effects” constituted the wife residuary legatee.

Where a testator directed that, after payment of his debts and legacies, his remaining property should be placed in proper securities, and appropriated to the education of his sister’s children as should seem “most meet and beneficial” to his executors; and, at the death of the testator, his sister’s children had already completed their education, the Court, on the death of the executors, granted *administration with the will annexed* to such children as beneficial residuary legatees (x).

(s) *In the goods of Dixon*, L. R., 4 P. D. 81; 47 L. J., P. & M. 57; 39 L. T. 234; 26 W. R. 883.

(t) *In the goods of Cadge*, L. R., 1 P. & D. 543; 37 L. J., P. & M. 15; 17 L. T. 484; 16 W. R. 406. See also *In the goods of Scarborough*, 30 L. J., P. & M. 85; 6 Jur., N. S. 1166; 9 W. R. 149; *In the goods of Sharman*, 38 L. J., P. & M. 47.

(u) *In the goods of Jupp*, L. R. 1891, P. 300; 60 L. J., P. D. &

A. The cases relied upon in argument in this case were *In the goods of Shephard*, 48 L. J., P. D. & A. 62; *Fleming v. Burrows*, 1 Russ. 276.

(x) *Presant v. Goodwin*, 1 S. & T. 544; 29 L. J., P. & M. 115; 6 Jur. 404. See also *Sidebottom v. Sidebottom*, L. R., 2 P. & D. 365; 41 L. J., P. & M. 23; 25 L. T. 855; 20 W. R. 303.

Words held to constitute beneficiaries residuary legatees.

Where a testator bequeathed the residue of his personal estate to be equally disposed of between five of his children whom he named, and one of those children died in his lifetime, the Court held that the five children took as tenants in common, and refused to make the grant to one of the sons of the testator, *as a legatee*, but made the grant to him as one of the next of kin, entitled to a share in the undisposed residue (*y*).

Residuary legatee, what is not.

On the other hand, where a testatrix by a codicil bequeathed to her aunt her "*wardrobe, trinkets, and other things*," and in her will and codicil had applied similar expressions, viz., "*everything else*," and "*all my effects*" to other portions of her property, the Court refused to come to the conclusion that by the bequest "*other things*" she intended to appoint her aunt residuary legatee (*z*).

A bequest of "whatever money remains at my agents . . . also any money that may result from the sale of my effects, after paying the few small debts I owe," was held not to entitle the legatee to *administration with the will annexed* as residuary legatee (*a*).

Grant to attorney of testator.

If the persons entitled to administration be in England, a grant of administration will not be made to their attorney, even at the request of all persons interested, unless the property consists entirely of property held in trust (*b*).

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 73.

Since, however, the passing of the 73rd section of the Court of Probate Act, 1857, the powers of the Court as to whom it shall or shall not grant administration, either with or without the will annexed, have been enlarged to an all but unlimited extent. This section enacts, that "Where a person has died or shall die wholly intestate as to his per-

(*y*) *In the goods of Pile*, 2 S. & T. 628; 31 L. J., P. & M. 40; 7 L. T. 194.

(*z*) *In the goods of Smith*, 3 S. & T. 561; 34 L. J., P. & M. 15; 10 Jur., N. S. 1084. See also *In the*

goods of Ludlow, 1 S. & T. 29.

(*a*) *In the goods of O'Loughlin*, L. R., 2 P. & D. 102; 39 L. J., P. & M. 53; 18 W. R. 902.

(*b*) *In the goods of Bullar*, 39 L. J., P. & M. 26; 22 L. T. 140.

sonal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, *by reason of the insolvency of the estate of the deceased or other special circumstances*, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit, to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit."

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 73.

In the following cases the Court made grants of administration with the will annexed under sect. 73, by reason of *special circumstances* :—

Grants of administration with the will annexed by reason of special circumstances under sect. 73.

(1.) By consent, where the executor could not be identified: *In the goods of Sawtell (c)*.

(2.) Where the Court recognized a deed executed by the deceased as testamentary, but not the appointment of executors therein contained: *In the goods of Cosnahan (d)*.

(3.) To nominees of residuary legatee, a married woman, without notice to her husband: *In the goods of Pine (e)*.

(c) 2 S. & T. 448; 6 L. T. 395; L. J., P. & M. 76; 14 L. T. 337;
10 W. R. 782. 14 W. R. 969.

(d) L. R., 1 P. & D. 183; 35 (e) L. R., 1 P. & D. 388; 36 L.
J., P. & M. 95; 17 L. T. 31.

Grants by
reason of
special cir-
cumstances
under sect. 73.

- (4.) To attorney of a married woman residuary legatee, without the consent of her husband: *In the goods of Warren (f)*.
- (5.) Executor bankrupt and gone to Australia, grant to a legatee: *In the goods of Cooper (g)*.
- (6.) Executrix dying in lifetime of testator, next of kin abroad. Grant to guardian of persons entitled in distribution: *In the goods of See (h)*.
- (7.) To trustees of infant daughter universal legatee, they not being executors according to the tenor: *In the goods of Stewart (i)*.
- (8.) Where a colonial Court granted probate to a certain legatee as executor according to the tenor of the will; the English Court not feeling able to make the grant in that capacity, made a grant to him under sect. 73 as the person entitled by the proper Court of the deceased's domicile to administer his effects: *In the goods of Earl (j)*.
- (9.) Under very special circumstances the Court made a grant to the nominee of a creditor, who had himself already obtained a grant of administration, with the will annexed, to the estate of his deceased mortgagor: *In the goods of Brown (k)*.
- (10.) Where of two executors one was dead and the other in Brazil, the Court made a grant to a testamentary guardian appointed by a minor who was sole legatee: *In the goods of Bat-terbee (l)*.

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| (f) L. R., 1 P. & D. 538; 37 L. J., P. & M. 12. | W. R. 683. |
| (g) L. R., 2 P. & D. 21. | (j) 36 L. J., P. & M. 127; 15 L. T. 446. |
| (h) L. R., 4 P. & D. 86; 48 L. J., P. & M. 70; 40 L. T. 658; 27 W. R. 665. | (k) 59 L. T. 523. |
| (i) L. R., 3 P. & D. 244; 44 L. J., P. & M. 37; 33 L. T. 72; 23 | (l) 14 P. D. 39; 58 L. J., P. D. & A. 38; 60 L. T. 838; 37 W. R. 416; 53 J. P. 231. |

The following are cases in which the Court refused to exercise the jurisdiction vested in it under sect. 73 in granting administration with the will annexed :—

Grants of administration with the will annexed under sect. 73 refused.

- (1.) Insolvency of deceased not considered sufficient ground for making grant to creditor as against parties having a better title: *In the goods of Cooke* (l).
- (2.) Or, *à fortiori*, where such insolvency is disputed: *In the goods of Fairweather* (m).
- (3.) Grant refused to creditor without citing residuary legatees who were resident in Australia: *Hawke v. Wedderburne* (n).
- (4.) The same to nominee agreed upon by next of kin, but having no interest in estate: *Teague v. Wharton* (o).
- (5.) Refusal to pass over executor merely on account of his bad character: *In the goods of Samson* (p).
- (6.) Mere fact that person entitled to grant wishes some other person to take it, not sufficient to justify grant under sect. 73: *In the goods of Hale* (q).

By 38 Geo. III. c. 87, s. 1, if the executors or executor to whom probate of a will shall have been granted are or is residing out of the jurisdiction of the Court, at the expiration of twelve months from the death of the testator, the Court is empowered, upon the application of any creditor, next of kin, or legatee, grounded upon an affidavit specified in the Act, to grant such special administration as is specified in the Act.

38 Geo. III. c. 87, s. 1.
“*Durante absentia.*”

By sect. 6 power is given to the Court, wherever an infant is appointed sole executor, to grant administration

“*Durante minore ætate.*”

(l) 1 S. & T. 267; 28 L. J., P. & M. 43.

(m) 2 S. & T. 588; 6 L. T. 788; 10 W. R. 862.

(n) L. R., 1 P. & D. 594; 37 L. J., P. & M. 33; 18 L. T. 336; 16 W. R. 712.

(o) L. R., 2 P. & D. 360; 41 L. J., P. & M. 13; 25 L. T. 764; 20 W. R. 214.

(p) L. R., 3 P. & D. 48; 42 L. J., P. & M. 59; 28 L. T. 478; 21 W. R. 568.

(q) L. R., 3 P. & D. 207; 44 L. J., P. & M. 45; 31 L. T. 799.

*Durante
minore ætate.*

with the will annexed to the guardian of such infant, or to such person as the Court shall think fit, until such infant attain the age of twenty-one years.

The special administration contemplated by this Act was, however, merely in cases where it was necessary to appoint somebody to carry on proceedings in Chancery.

C. P. Act,
1857, s. 74.
C. P. Act,
1858, s. 18.

Now, however, by the 74th section of the Court of Probate Act, 1857, and the 18th section of the Court of Probate Act, 1858, the provisions of this statute are extended, 1st, to cases of intestacy; and 2ndly, to all cases, without regard to the question of whether proceedings in Chancery are likely to arise or not.

See, on this point, *post*, Chap. XVIII. See also Wms. on Exors., 9th ed. pp. 405—407, 433—439.

Administra-
tion *de bonis
non* with the
will annexed.

With regard to those cases where it is necessary to grant an *administration de bonis non with the will annexed*, see *post*, Chap. XVII.

In conclusion, it must be observed, that an *administrator with the will annexed* cannot be forced to take out administration with a later will annexed, when the first administration is revoked, even though he may have intermeddled with the estate (*r*). In the very recent case of *In the goods of Ley (s)*, the executrix of a will dated 1842 had disappeared for upwards of 40 years. The testatrix died in 1862, and in December, 1891, administration with the will of 1842 annexed was granted to the representative of her next of kin.

(*r*) *In the goods of Davis*, 4 S. & T. 213; 29 L. J., P. & M. 72. For further cases on grants of administration with the will annexed, see *In the goods of Payer*, 1 Dea. 187; *Bigg v. Keen*, 2 Lee, 414; *Taylor v. Diplock*, 2 Phill. 276; *West v. Willby*, 3 Phill. 381; *Atkinson v. Barnard*, 2 Phill. 320; *Repington v.*

Holland, 2 Lee, 256; *In the goods of Martindale*, 1 S. & T. 8; *Cull v. Guillerme*, 12 Jur. 966; *In the goods of Newstead*, 1 Curt. 593; *Saloin v. Hays*, 4 Hagg. 386; *In the goods of Dawson*, 2 Rob. 136; 7 N. of C. 317; *Dempsey v. King*, 2 Rob. 397. (*s*) (1892) P. 6; 61 L. J., P. D. & A.

CHAPTER XV.

AS TO HOW GRANTS OF PROBATE AND ADMINISTRATION ARE AFFECTED BY THE DOMICIL OF THE DECEASED TESTATOR OR INTESTATE; AND BY THE SITUS OF HIS PROPERTY, AND THEREWITH OF WILLS MADE UNDER THE PROVISIONS OF THE STATUTE 24 & 25 VICT. c. 114.

WHERE the deceased does not die domiciled in England, the Court has, as a general rule, no jurisdiction to grant letters of administration, unless the deceased leaves personal property in this country (*a*). Locality of estate.

But it is otherwise if the deceased were domiciled in England at the time of his death; for as personal property, having no *situs* of its own, wherever situate, follows the person, the Court will grant probate of a document, though it purports to deal only with property out of its jurisdiction (*b*).

Although at one time doubtful (*c*), it is now fully decided that whenever a will has been formally recognized and acted upon by a Court of competent jurisdiction in the country of the domicile of the deceased at the time of his death, and remains unquestioned in that country, the Will valid by law of deceased's domicile.

(*a*) *Evans v. Burrell*, 28 L. J., 405; *In the goods of Winter*, 30 L. J., P. & M. 82. See also *In the goods of Fittock*, 32 L. J., P. & M. 157; 9 Jur., N. S. 311; *In the goods of Tucker*, 3 S. & T. 585; 34 L. J., P. & M. 29; *In the goods of Coode*, L. R., 1 P. & D. 449; 36 L. J., P. & M. 129; 16 L. T. 746; Wms. on Exors. 8th ed. p. 436.

405; *In the goods of Winter*, 30 L. J., P. & M. 56. See also *Jarincey v. Patey*, 1 Vern. 397; 11 Vin. Abr. 59, 69; *Att.-Gen. v. Cockerell*, 1 Price, 179; *Tyer v. Bell*, 2 Myl. & Cr. 89; *Currie v. Bircham*, 1 Dow. & Ry. 35; Wms. on Exors. 9th ed. p. 296.

(*c*) *In the goods of Read*, 1 Hagg. 474—per Sir John Nicholl.

(*b*) *Spratt v. Harris*, 4 Hagg.

Will valid by law of deceased's domicile.

Probate Division as a rule follows grant made by Court of deceased's domicile.

Probate Division will not allow the validity of such will to be litigated here (*d*).

In the course of his judgment in this case, Sir James Hannen cites the following from the judgment of Lord Penzance, *In the goods of Smith* (*e*): "It is a general rule, on which I have already acted, that when a person dies domiciled in a foreign country, and the Court of that country invests anybody, no matter whom, with the right to administer the estate, this Court ought to follow the grant, simply because it is the grant of a foreign Court, without investigating the grounds on which it was made, and without reference to the principles on which grants are made in this country."

Accordingly, where a testator was domiciled in New South Wales, administration with the will annexed was granted to the person entitled to it by the law of that country (*f*), and in another case the Court refused to allow the validity of the will of a person domiciled in the Island of Jersey to be disputed after the Ecclesiastical Courts had decreed probate of it according to the law of the Island (*g*).

Estate to be administered by Court where estate is situate.

But if any part of the property be in England, probate or administration must also be taken out here; for though the law of the domicile of a deceased person governs the succession to his personal estate wherever situated, the estate itself must be administered in the country in which possession is taken of it under lawful authority (*h*). The duty of the English Court would in such a case be, as it were, ministerial merely to grant ancillary probate or administration.

(*d*) *Miller v. James*, L. R., 3 P. & D. 4; 42 L. J., P. & M. 21; 27 L. T. 862; 21 W. R. 272.

(*e*) 16 W. R. 1130.

(*f*) *In the goods of Earl*, L. R., 1 P. & D. 450.

(*g*) *Miller v. James*, L. R., 3 P. & D. 4; 42 L. J., P. & M. 21; 27 L. T. 862; 21 W. R. 272; see

also *Enohin v. Wylie*, 10 H. of L. Ca. 13; *In the goods of Gutierrez*, 38 L. J., P. & M. 48; 20 L. T. 758; 17 W. R. 742; *In the goods of Probart*, 36 L. J., P. & M. 71; 16 L. T. 298; 15 W. R. 798.

(*h*) *Preston v. Melville*, 8 Cl. & F. 1.

Thus where an executor is appointed by a foreign will, the nature and extent of the office conferred by the appointment are regulated by the law of the testator's domicile, and not by the English law, and this rule extends even to the property situate in England; if by the law of the domicile, the executorship lasts only for a limited period, the Court of Probate cannot, after that period has expired, grant probate to the executor. Where a domiciled Frenchman by his will appointed A. his *exécuteur testamentaire*, and B. his universal legatee; a French Court having decided that A.'s executorship had expired, and that he had no longer any right to intermeddle with the estate of the testator either in France or England, but that such right belonged exclusively to the representatives of B.; the Court of Probate, holding that it was bound by that decision, refused to grant probate to A., and granted administration with the will annexed to the representatives of B. (i).

English Court follows Court of deceased's domicile both as to the appointment of his personal representative and as to succession to his personal estate.

It is for the law of the domicile of the deceased to determine the succession to his personal estate, and when the proper tribunal of domicile has decided in whom the right of succession vests, the Court of Probate in this country will be bound by its decision (j).

Where a domiciled Paraguayan died in Paraguay, leaving personal property in England, and after his death, but before a grant was made in England, a decree of the Government of Paraguay declared that all the property of the deceased, wheresoever situate, was the property of the nation of Paraguay; the Court held that, although by the law of Paraguay, as existing at the time when a grant of probate of the deceased's will was applied for, the will might be invalid, the right to the grant and the succession to the property must be governed by the law of Paraguay

(i) *Lanueville v. Anderson*, 2 S. & T. 24; 30 L. J., P. & M. 25. N. S. 653; 8 L. T. 518; 11 W. R. 853; aff. nom. *Dogliani v. Crispin*,

(j) *Crispin v. Dogliani*, 3 S. & T. 96; 32 L. J., P. & M. 169; 9 Jur. L. R., 1 H. L. 301; 35 L. J., P. & M. 129; 15 L. T. 44.

English Court follows Court of deceased's domicile both as to the appointment of his personal representative and as to succession to his personal estate.

as it existed at the time of the death, and therefore that the Government of Paraguay had no *locus standi* to contest the validity of the will (*k*).

It was held in the case of *In the goods of Cosnahan* (*l*), that although the English Court of Probate would follow the grant of the Court of the testator's domicile, as to the document which that Court had admitted to probate, it would not do so as to the person to whom the grant was made, but the practice of the Court in this respect as it now exists, and the principle on which that practice is founded, are clearly and concisely declared by Lord Penzance in giving judgment in the case of *In the goods of Earl* (*m*).

In the goods of Earl.

Judgment of Lord Penzance.

His lordship says: "In this case I took time to consider the question to what extent the Court ought to follow a foreign grant of probate, the grant having been made to the applicant by the Court of the country of domicile as executrix according to the tenor. It is admitted that the terms of the will were not such as to constitute the applicant executrix according to the tenor in this country, but the Court is asked to follow the foreign grant in that respect. I have looked into the cases in which questions of this sort have arisen, and I find that for a long time considerable difficulty was felt as to the extent to which foreign grants ought to be followed. In *Larpent v. Sindrey* (*n*), Sir J. Nicholl said, 'The form of the grant in India is not exactly according to our practice. Here the two papers would have been proved as together containing the will of the deceased; but the Court in India, which, as the deceased died domiciled there, is the Court of competent jurisdiction, has considered them as a will and codicil, and this Court

(*k*) *Lynch v. Prov. Gov. of Paraguay*, L. R., 2 P. & D. 268; 40 L. J., P. & M. 81; 25 L. T. 164; 19 W. R. 982. See also *In the goods of Hallyburton*, L. R., 1 P. & D. 90; 35 L. J., P. & M. 122;

14 L. T. 136; 12 Jur., N. S. 416.

(*l*) L. R., 1 P. & D. 183; 35 L. J., P. & M. 76.

(*m*) L. R., 1 P. & D. 451.

(*n*) 1 Hag. 383.

is, perhaps, bound to follow it. The question how far this and other Courts of Probate are to be governed by the decision of the Court of Probate where the deceased was domiciled has never been expressly determined; but I certainly should not feel inclined to depart from what has been the general practice unless a strong case of inconvenience were brought under my consideration.' In *In the goods of Read (o)*, the same learned judge said, 'It is not fully decided whether this Court is bound in all cases and under all circumstances to follow the grant of probate made by a Court of competent jurisdiction. . . . It may often happen that but a very small part of the property is in India, where yet the party may be domiciled, and then, according to the present practice, the probate in India would still regulate the grant here. In such cases, therefore, the party, in order to obtain that to which he is justly entitled, and which he would naturally obtain if this Court might follow its own rules, would be compelled to go to a large expense in appealing to the Privy Council from the irregular decision of a Court that has only original jurisdiction over a small part of the effects, but which by a sort of courtesy eventually regulates the whole.' In the case of *In the goods of the Countess Da Cunha (p)*, the Prerogative Court in granting administration followed the practice of the Court of the country of domicile, although it was contrary to its own; but *In the goods of H.R.H. the Duchess D'Orleans (q)* this Court refused to do so. In *Viesca v. D'Aramburu (r)*, Sir Herbert Jenner, after referring to the decision of a Court of the country of the deceased's domicile to the effect that, pending a suit as to the will of the deceased, the property should be secured in the hands of a judicial administrator, continued, 'I do not know that this order is absolutely binding on this Court; but, if it be discretionary, the Court would be

In the goods of Earl.
Judgment of Lord Pen-
zance.

(o) 1 Hag. 476.

(p) *Ib.* 237.

(q) 1 S. & T. 253; 28 L. J., P. & M. 129.

(r) 2 Curt. 280.

*In the goods
of Earl.*
Judgment of
Lord Pen-
zance.

inclined to follow the decision of the tribunal to which all the parties are subject, and which ought to have that which is incidental to the cause, namely, the care and security of the property.' The same principles were acted upon *In the goods of Isabella Stewart* (s), and *In the goods of David Rogerson* (t). The result of the cases is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions of the Court of Probate (as *In the goods of H.R.H. the Duchess of Orleans* (u)) have militated against the rule of following the foreign grants. This question was considered in *Enohin v. Wylie* (v), in which Lord Westbury (Lord Chancellor) said: 'Now, the utmost confusion must arise if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first, of declaring who is the personal representative, and, next, of interpreting the will, and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in London may have personal property in France, Spain, New York, Belgium and Russia, and if the course pursued by the Court of Probate and the Court of Chancery in the present case were followed by the Courts of those several countries, there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there are countries in which he is possessed of personal property.' I think there is strong good sense in these remarks, and the practical principle there pointed out is one that ought to be adhered to. The only question is, in what way ought the Court to act upon it? There was no power in the old Ecclesiastical Courts to make a grant, except in the direction

*Enohin v.
Wylie.*
Judgment of
Lord West-
bury.

(s) 1 Curt. 904.

(t) 2 Curt. 656.

(u) 1 S. & T. 253; 28 L. J., P.
& M. 129.

(v) 10 H. of L. Ca. 1.

indicated by the practice of those Courts. This Court, however, is armed with a special power by the 73rd section of 20 & 21 Vict. c. 77 (*w*). *In the goods of Earl.*
Judgment of Lord Penzance.

“I think the Court ought to act upon that section, and to make a grant in all such cases as the present to the person who has been clothed by the Court of the country of domicile with the power and duty of administering the estate, no matter who he is, or on what ground he has been clothed with that power. The grant under the 73rd section will describe him as a person having that power, and thus the difficulty will be avoided of declaring that a person is executor who, according to the practice of the Court, is not executor, and of continuing a chain of executorship by persons who are executors according to the law of a foreign country, but not according to the law of this country. It is one thing to make a grant of administration, and another to make a grant of probate to a person as executor, which involves many peculiar consequences. I shall make the grant of administration with the will annexed to the applicant, under the 73rd section, as the person entitled under the grant of the Court of the country of the deceased’s domicile to administer the estate.”

The practice, therefore, of the Court now is to follow the grant of the Court of the testator’s domicile, not merely as to the document which that Court has admitted to probate, but also as to the person to whom the grant is made, as the person declared to be entitled by a Court of competent jurisdiction (*x*). Present practice is to follow the foreign grant.

In a recent case, a testator whose domicile of origin was Scotch, executed a testamentary appointment while on a visit to this country in the exercise of a power contained in his marriage settlement. He afterwards acquired a domicile in New Zealand, and there duly executed a will

(*w*) See *ante*, p. 179, and *post*, pp. 228, 241, 262.

(*x*) See also *Miller v. James*, L. R., 3 P. & D. 4, and the judgment

of Lord Penzance in *In the goods of Smith*, quoted in *Miller v. James*, at p. 5.

Domicil in
New Zealand.
Testamentary
appointment
made in Eng-
land.

in which he referred to this testamentary appointment and confirmed it. The executors obtained probate of the will in New Zealand, but no mention of the testamentary appointment was made in the probate. The Court refused an application for a grant of limited administration with the testamentary appointment annexed, holding that the proper course was to apply to the New Zealand Court for a fresh grant, including the testamentary appointment (*y*).

24 & 25 Vict.
c. 114.

Previous to the year 1861, many nice questions arose as to how far wills were valid where a change of domicil, subsequent to the making of the will, had occurred. These questions, however, now, *as far as British subjects are concerned*, are put an end to by the 24 & 25 Vict. c. 114.

Sect. 1. Wills
of British
subjects made
out of the
United King-
dom.

By the first section of that Act "every will and other testamentary instrument made out of the United Kingdom by a *British* subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin."

Sect. 2. *Ibid.*
made within
the United
Kingdom.

Sect. 2. "Every will and other testamentary instrument made within the United Kingdom by any *British* subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in *England* and *Ireland* to

(*y*) *In the goods of Crawford*, 15 P. D. 212; 60 L. J., P. D. & A. 16; 63 L. T. 232; 54 J. P. 504. See further, on subject of

foreign domicil, *Milnes v. Foden*, 15 P. D. 105; 59 L. J., P. D. & A. 62; 62 L. T. 498.

probate, and in *Scotland* to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.” 24 & 25 Vict. c. 114.

Sect. 3. “No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same.” Sect. 3. Subsequent change of domicile.

Sect. 4. “Nothing in this Act contained shall invalidate any will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act” (z). Sect. 4. Saving clause.

But this statute does not extend to any will made before the date of the passing of the Act, August 6th, 1861. Therefore, in a case which came before the Court, in 1865, on motion for probate of a foreign will, bearing date July 17th, 1861, Lord Penzance held that it was necessary to show, either that the will had been recognized by a Court of the foreign country, or that it was valid according to the law of the foreign country, *and that the testator was domiciled in the foreign country at the time of his death* (a). Does not affect wills made before Aug. 6, 1861.

The effect of this statute in relieving the Court from trying difficult questions of domicile and in carrying out the real wishes of testators, has been most beneficial; for under it, where a British subject dies abroad leaving a will, either executed in England according to the law of England, or in any foreign country according to the law Effect of above statute.

(z) See Wms. on Exors., 9th ed., pp. 308, 309. 4 P. D. 76; 47 L. J., P. & M. 32; 39 L. T. 123; 26 W. R. 357;

(a) *In the goods of Deshais*, 4 S. & T. 13; 34 L. J., P. & M. 58; 12 L. T. 54; 13 W. R. 640. See *In the goods of Raffeneil*, 3 S. & T. 49; 32 L. J., P. & M. 203; 9 Jur. N. S. 386; 8 L. T. 211; 11 W. R. 549.

24 & 25 Vict.
c. 114.

Will made in
England, tes-
tator domi-
ciled abroad
at time of
death.

Will in Eng-
lish form re-
lating to
property in
England,
ditto in
French form
relating to
property in
France.

Subsequent
change of
domicil does
not revoke
will.

Law of one
country only
regarded.

of that country, it becomes no longer material to inquire whether or not he has acquired a foreign domicil (*b*).

Accordingly, where a naturalized British subject whilst domiciled in England made a will according to the forms required by the law of England, and at the time of his death was domiciled in Italy, the Court held that his will was entitled to probate, under 24 & 25 Vict. c. 114, s. 2 (*c*).

And where the deceased, a Frenchman by birth, but naturalized in England, executed a will and codicil in the English form relating to his property in England only, and a holograph will, signed and dated, disposing of his property in France, but referring directly to the English will, and died in Paris, it was held: That if it could be shown that the will and codicil in the English form were made in a form permitted by the law of France in the case of British subjects resident in France, they could be admitted to probate, under 24 & 25 Vict. c. 114, s. 1, as valid, according to the law of the place where made (*d*).

A domiciled Scotchman made a will, and afterwards married in Scotland, and subsequently acquired an English domicil, which he retained until his death. The will was not revoked by his marriage according to Scotch law, although it would have been revoked in England had he been domiciled here by 1 Vict. c. 26, s. 18. The Court held that it was not revoked by his subsequent change of domicil, and was entitled to probate in England (*e*).

A man cannot have two domicils, at least with reference to the succession of his personal estate (*f*); therefore, the Court can have regard to the law of *one* country only at a

(*b*) See *In the goods of Rippon*, 3 S. & T. 177; 32 L. J., P. & M. 141; 9 L. T. 117.

(*c*) *In the goods of Gally*, 1 P. D. 438; 45 L. J., P. & M. 107; 24 W. R. 1018.

(*d*) *In the goods of Lacroix*, 2 P.

D. 94; 46 L. J., P. & M. 40.

(*e*) *In the goods of Reid*, L. R., 1 P. & D. 74; 38 L. J., P. & M. 1; 19 L. T. 265.

(*f*) *Crookenden v. Fuller*, 1 S. & T. 441; 29 L. J., P. & M. 1; 1 L. T. 70; 5 Jur. N. S. 1222.

time; so where a testator made a will in India and added a codicil at Florence; they were not witnessed, and were invalid both by the law of England and Italy; he wrote on the back of the will at Genoa a second codicil, which was also not witnessed, but which was well executed, though not valid, according to the law of Italy:—Held, that in determining the question whether a paper is valid as a testamentary instrument under 24 & 25 Vict. c. 114, the Court can have regard to the law of one country only at a time; it therefore declined to regard so much of the Italian law as held the second codicil well executed, and then, recurring to the English law, to apply the principle of confirmation, refused probate of all three papers (*g*).

24 & 25 Vict.
c. 114.

Law of one
country only
regarded
at a time.

A will made according to the forms of English law by an alien who, though her domicile of origin was English, was domiciled abroad at the time of making her will and of her death, is not entitled to probate in this country (*h*). Neither is the will of an alien domiciled in this country, made here in accordance with the law of his domicile of origin, but not according to the forms required by the law of England (*i*). But this statute does not affect the provisions of sects. 8 and 10 of the Wills Act, that no appointment made in exercise of a power shall be valid unless executed in the manner therein provided (*k*).

Will of alien
whose domici-
cil of origin
was English
made abroad.

Will of alien
domiciled
in this
country made
according to
law of domicile
of origin.

Where an Englishman resident in Scotland made a will validly executed according to the law of Scotland, but not according to the law of England, the Court held that the will passed leasehold property situated in England by virtue of 24 & 25 Vict. c. 114, s. 2 (*l*).

Englishman
resident in
Scotland.

Formerly much difficulty was experienced in getting representatives of a deceased domiciled in England, Scot-

Grants under
21 & 22 Vict.
c. 56.

(*g*) *Pechell v. Hilderley*, L. R., 1 P. & D. 673; 38 L. J., P. & M. 66; 20 L. T. 1014; 17 W. R. 865.

(*h*) *Bloxam v. Favre*, 8 P. D. 101; 52 L. J., P. D. & A. 42; 31 W. R. 610; 47 J. P. 377.

(*i*) *In the goods of Keller*, 61 L. J., P. D. & A.

(*k*) *Re Kirwan's Trusts*, 25 Ch. D. 373; 52 L. J., Ch. D. 952; 49 L. T. 292; 32 W. R. 581.

(*l*) *In re Watson, Carlton v. Carlton*, 35 W. R. 711.

Grants under
21 & 22 Vict.
c. 56.

land or Ireland appointed, when he died possessed of property in either or both of the other two countries where he was not domiciled, besides his property in the country where he was domiciled, as the three countries were foreign to one another. This has now been much facilitated by the operation of the 20 & 21 Vict. c. 79 (relating to Ireland) (*m*), and the 21 & 22 Vict. c. 56 (relating to Scotland) (*n*).

(*m*) "By the 94th section of the 20 & 21 Vict. c. 79, it is provided that: 'From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to, and a copy thereof deposited with the registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and, being duly stamped, shall be of the like force and effect, and have the same operation in Ireland as if it had been originally granted by the Court of Probate in Ireland.'

"And by the following section of the same Act it is provided that, 'From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to, and a copy thereof deposited with the registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the last-mentioned Court, and, being duly stamped, shall be of the like force and effect, and have the same operation in England as if it had been originally granted by the Court of Probate

in England.'

"By the 29th section of the Court of Probate Act, 1858, it is enacted that 'letters of administration granted by the Court of Probate in Ireland shall not be re-sealed under sect. 95 of the 20 & 21 Vict. c. 79, until a certificate has been filed under the hand of a registrar of the Court of Probate in Ireland, that bond has been given to the judge of the Court of Probate in Ireland in a sum sufficient in amount to cover the property in England as well as in Ireland in respect of which such administration is required to be re-sealed.'

"It is directed by the 73rd Rule (1862), that 'the seal is not to be affixed to any probate or letters of administration granted in Ireland, so as to give operation thereto as if the grant had been made by the Court of Probate in England, unless it appear from a certificate of the Commissioners of Inland Revenue, or their proper officer, that such probate or letters of administration is duly stamped in respect of the personal estate and effects of which the deceased died possessed in England. In respect to letters of administration, the provisions of statute 21 & 22 Vict. c. 95, s. 29, must also be complied with.'"

(*n*) "By the 9th section of the 21 & 22 Vict. c. 56 (the Confirma-

But this Act does not apply to eiks or additional confirmations which do not confirm the executors in respect of

Eiks or additional confirmations.

tion and Probate Act, 1858), it is provided that 'from and after the date aforesaid (*i.e.*, the 12th day of November, 1858), it shall be competent to include, in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both: provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall, by his interlocutor, find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: provided also, that the value of such personal estate and effects situated in England or Ireland respectively, shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated in the United Kingdom.'

"By the 12th section of the same Act, it is provided that 'from and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commis-

sary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.'

"By the 14th section of the same Act, it is provided that 'from and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said Court, the commissary clerk shall endorse or write on the back or face of such grant a certificate in the form, as near as may be, of the schedule (F) hereunto annexed, and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland, as if a confirmation had been granted by the said Court.'"

Grants under
21 & 22 Vict.
c. 56.

Eiks or addi-
tional confir-
mations.

personal estate situate in Scotland, but only in respect of personal estate situate in England (*o*); nor generally to eiks (*p*). In a later case, the deceased died domiciled in Scotland, and a confirmation issued from the proper officer to the widow of the defunct, on her filing an inventory of the property of the deceased, distinguishing which portion thereof was situated in Scotland, and which in England. This confirmation was sealed in the registry of the Court of Probate in England. Subsequently it was discovered that the deceased had left other property in this country, and on an additional inventory of such property being filed, an eik, or additional confirmation, was granted in Scotland to the widow. The Court ordered the seal of the Court of Probate to be attached to such additional confirmation (*q*).

21 & 22 Vict.
c. 56, s. 14.

Note or me-
morandum
on probate as
to domicil of
deceased.

It was formerly held that the note or memorandum on a probate that the deceased died domiciled in England, mentioned in sect. 14 of 21 & 22 Vict. c. 56 (*r*), must be written before the probate issues; but it was decided in *In the goods of Allison* (*s*), that, under this Act, it is not necessary that the memorandum of English domicil should be in or on the probate at the time it is issued; and where, by a *bonâ fide* mistake, the probate was taken for property in England only, and it afterwards turned out that there was property in Scotland, the Court allowed a supplemental affidavit to be filed, and ordered the memorandum of English domicil to be written on the probate.

The form of a testament testamentar, or confirmation of

(*o*) *In the goods of Wingate*, 2 S. & T. 625; 8 Jur., N. S. 142.

(*p*) *In the goods of Hutcheson*, 3 S. & T. 165; 32 L. J., P. & M. 167; 11 W. R. 772. An "eik," or additional confirmation, is granted where property has been discovered after the original grant of confirmation had issued, and a supplementary inventory is filed. It appears to be the same as "eik" "to

eik out," and means "something added."

(*q*) *In the goods of Ryde*, L. R., 2 P. & D. 86; 39 L. J., P. & M. 49.

(*r*) *Ante*, p. 195.

(*s*) 3 S. & T. 574; 34 L. J., P. & M. 20; 11 L. T. 514; 10 Jur., N. S. 1244; 13 W. R. 277 (overruling *In the goods of Muir*, 1 S. & T. 294; 28 L. J., P. & M. 49).

an executor nominate contained in Schedule (E.) of the Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56), recites that the executor nominate has given upon oath an inventory of the personal estate and effects of the deceased at the time of his death situated in Scotland, or England, or Ireland. A confirmation was tendered for sealing from which the words "at the time of his death" were omitted:—Held, that those words had been properly omitted since the passing of the 23 Vict. c. 15, and the 23 & 24 Vict. c. 80 (*t*), and the confirmation was ordered to be sealed (*u*).

21 & 22 Vict.
c. 56.
Inventory
under.

Words "at
the time of
his death,"
omission of.

The seal of the Court to Irish or Scotch grants must be affixed by, and application must be made to, the principal registry. No application of that description can be made to a district registry (*x*).

Scotch or
Irish grants.

For the necessary affidavit and steps to be taken where a grant of probate or administration under the 21 & 22 Vict. c. 56, is required for the whole personal estate and effects of a deceased within the United Kingdom, see Rule 74 of the Principal Registry (Non-Contentious Business), and Rule 86 of the District Registry.

Rule 74, P. R.,
Non-Con-
tentious
Business.

The finding of the commissary as to Scotch domicil under 21 & 22 Vict. c. 56, ss. 9, 12 (*y*), is conclusive evidence of the fact of domicil for the purposes of that Act only (see sect. 17) (*z*)—*i. e.*, for rendering it unneces-

Finding of
commissary
as to Scotch
domicil con-
clusive.

(*t*) The first of these statutes is intitled "An Act for granting to her Majesty certain Duties of Stamps," and the second "An Act to regulate the Levying and Collection of the Inventory Duty payable upon Heritable Securities and other Property in Scotland." The latter Act is explanatory of and in addition to the former, and under its provisions, property for payment of inventory duty, is to be valued at the date of the affidavit to the inventory, consequently the

words "at the time of his death," introduced into Schedule (E.) of the C. and P. Act, 1858 (which schedule by section 10 is to be followed as nearly as circumstances will permit), have ceased to be of any sort of use.

(*u*) *In the goods of Hay*, 3 S. & T. 273; 33 L. J., P. & M. 25; 9 L. T. 454; 10 Jur., N. S. 136.

(*x*) Rule 87, D. R.

(*y*) *Ante*, pp. 194, 195.

(*z*) By sect. 17 it is provided "that any such statement, and the

Grants under
21 & 22 Vict.
c. 56.

sary to take an English probate in respect of assets in England; but it has no effect in determining any issues raised in a suit in the Court of Probate in England, which will proceed to try such issues, though a confirmation of the will in question be tendered for the seal of the Court (a).

Sect. 12.

The executors of a Scotch will, having sent the original confirmation granted by the Commissary Court to the Colony of Victoria, obtained a duplicate confirmation from that Court, and applied under the 12th section of the 21 & 22 Vict. c. 56, to have the seal of the Probate Court affixed to it; the Court ordered the seal to be affixed, on the ground that it was bound to give faith to the commissary's certificate, and could not take into consideration the fact that the confirmation was a duplicate (b).

Irish grant.
20 & 21 Vict.
c. 79, s. 95.

Where A. died in Ireland, possessed of personal property in England, and the Irish Court of Probate granted administration of his effects to B., no will having been found; afterwards C. propounded in this Court a will of the deceased; B. opposed it, and obtained a verdict upon issues raised by him: upon the application of B. the Court ordered the Irish grant of administration to be delivered out of the registry, in order that it might be resealed by this Court under the 20 & 21 Vict. c. 79, s. 95 (c).

interlocutor of the commissary finding that the deceased was domiciled in Scotland shall be evidence, and have effect for the purposes of this Act only."

(a) *Hawarden v. Dunlop*, 2 S. & T. 340; 31 L. J., P. & M. 17; 5 L. T. 765.

(b) *In the goods of Webster*, 29 L. J., P. & M. 66; 5 Jur., N. S. 1270.

(c) *Divenny v. Corcoran*, 32 L. J., P. & M. 26. Where a testator died leaving a large estate in Scotland, and a small estate in England, and probate having been taken out in

Scotland, a legatee applied to the Court for a grant of administration of the estate in this country: Held, that the Court is not bound to make such a grant, but that its power is discretionary: Held, also, that it not having been shown that the executors were not doing their duty, there was no necessity for the grant in this country. *In the goods of Ewing*, L. R., 6 P. D. 19; 50 L. J., P. 11; *Exors. of Perry v. The Queen*, L. R., 4 Ex. 27; *Forbes v. Steven*, L. R., 10 Eq. 178; *Att.-Gen. v. Higgins*, 2 H. & N. 339, cited in judgment.

CHAPTER XVI.

OF SIMPLE ADMINISTRATION—TO WHOM GENERAL LETTERS
OF ADMINISTRATION SHOULD BE GRANTED (*a*).

As we have seen, the grant of administration pure and simple is made where the deceased has died wholly intestate as to his personal estate (*b*). When granted.

It is scarcely within the scope of the present Treatise to define what are the powers and duties of a personal representative, but it should always be borne in mind, that an administrator derives his authority from the Court, while an executor derives his from the will; therefore, the latter is in possession of the property, in point of law, from the death of the testator, and before probate is granted; whereas the powers of the former commence only upon the grant of letters of administration (*c*). Powers and duties of a personal representative.

As we have seen (*d*), the power of entertaining suits for the distribution of residues, formerly exercised by the Ecclesiastical Courts, was taken away from the Court of Probate by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 23. Neither does the Probate Division entertain an action for the distribution of the estates of deceased persons, whether they have died testate or intestate. Such matters are dealt with exclusively by the Chancery Division. Court of Probate Act, 1857, s. 23.

(*a*) See on this subject, Wms. on Exors., 9th ed. pp. 339—398.

(*b*) *Ante*, p. 104.

(*c*) See Wms. on Exors., 9th ed. pp. 342—345.

(*d*) *Ante*, p. 6.

Who are incapable of acting as administrators.

"The incapacities of an administrator not only comprise those persons who have already been mentioned as disqualified for the office of executor (*e*), but extend to outlawry, and bankruptcy, or other lawful disability. But it is no incapacity to be an administrator that the next of kin is an alien" (*f*). And it may be added that as an administrator is required to give a bond, as security for the due performance of his office, it follows that all persons who are unable to execute such a bond are in fact disqualified.

Infants and minors.

A minor, owing to his inability to enter into a bond, cannot be an administrator; and if the next of kin be a minor, as often happens in the case of an intestate leaving a family, administration must be granted to some other person during his minority.

Administration *durante minore ætate*.

This species of grant is called administration *durante minore ætate*, and is limited to such time as the minor shall be under the full age of twenty-one years (*g*).

Grant to minors personally.

But on one occasion the Prerogative Court made a limited grant of administration to a minor married in Portugal to a Portuguese husband, on the ground that by the law of her domicile, her disabilities as a minor had ceased (*h*).

"However, in a subsequent case, Sir C. Cresswell refused to grant administration to a minor, though by the law of the country where the deceased was domiciled the minor was entitled to the grant, and that learned judge appeared to be of opinion, that the Court ought not to follow the practice of the Court of Domicil, where it is in contradiction to English law" (*i*), for his lordship observed, "In this country a minor is under a disability, and there seems to be no instance of the Court having granted administration to a minor who cannot take upon himself the liabilities

(*e*) See *ante*, Chap. X.

(*h*) *In the goods of Da Cunha*,

(*f*) *Wms. on Exors.*, 9th ed. p. 387.

1 *Hagg.* 237.

(*g*) See *post*, Chap. XVIII.

(*i*) *Wms. on Exors.*, 9th ed. p. 388.

which the law casts upon an administrator—he cannot, for instance, execute a bond” (*k*).

“Coverture was no incapacity, even before the Married Women’s Property Act, 1882, for the office of administratrix. Therefore, if a *feme covert* be next of kin to the intestate, administration shall be granted to her” (*l*).

But she could not before the Married Women’s Property Act, 1882, take administration without her husband’s consent, inasmuch as he must join in the administration bond; but if the husband were abroad or otherwise incompetent a stranger could join in the administration bond (*m*). And where the husband of a married woman who was entitled to letters of administration, refused to execute the bond or to assist her in obtaining the grant, the Court granted administration to her, and allowed a third person to execute the bond (*n*). On the other hand she could not, by renunciation in favour of a third person, deprive her husband of his right to the grant (*o*).

But a married woman who had obtained a protection order under sect. 21 of the Matrimonial Causes Act, 1857, or who had obtained a decree for a judicial separation, and, *à fortiori*, one who had been divorced, was, with respect to her capacity to act as an administratrix, in the same position as a *feme sole*.

And, “since the commencement of the Married Women’s Property, Act, 1882, a married woman may take administration without the consent of her husband, and in all respects act in the matter concerning the intestate’s estate as if she were a *feme sole*” (*p*).

(*k*) *In the goods of H. R. H. The Duchess of Orleans*, 1 S. & T. at p. 254. S. & T. 189; 31 L. J., P. & M. 126.

(*l*) *Wms. on Exors.*, 9th ed. p. 388. (*o*) *Haynes v. Matthews*, 1 S. & T. 460. See also *Da Rosa v. De Pinna*, 2 Cas. temp. Lee, 390; *Cook v. Cowper*, *ibid.* 487.

(*m*) *Ibid.* See also *Bubbers v. Harfey*, 3 Curt. 50. (*p*) *Wms. on Exors.*, 9th ed. p. 388.

(*n*) *In the goods of Sutherland*, 4

Grant to minors personally.

To *feme covert* before Married Women’s Property Act, 1882.

Husband had to join in bond.

Protection order. 20 & 21 Vict. c. 85, s. 21.

Since the Married Women’s Property Act, 1882.

To whom
administra-
tion may be
granted.

As has been already seen (*q*), those who are *primâ facie* entitled to administration of the personal estate of a deceased intestate are, in the words of the statute 38 Hen. 8, c. 5, the "*widow or next of kin, or both,*" at the discretion of the Ordinary. And it must be remembered that in all cases the next of kin means the next of kin *at the time of the death of the deceased*, not at the time of making the application for the grant.

Order of
preference.

The following is the order in which next of kin stand in respect of their right to obtain administration:—

1. Husband or wife (although not next of kin).
2. Child or children.
3. Grandchild or grandchildren.
4. Great-grandchildren, &c. until the direct lineal descendants of the intestate to the remotest degree are exhausted.
5. Father.
6. Mother.
7. Brothers and sisters.
8. Grandfathers and grandmothers.
9. Nephews and nieces, uncles, aunts, great-grandfathers, or great-grandmothers.
10. Great-nephews, great-nieces, &c., and so on, until the collateral relations of the intestate to the remotest degree are exhausted. All being equally entitled who stand in the same degree (*r*).

Husband.

In whatever way the husband first became entitled to the grant of administration of the goods of the wife, his right to such a grant was clearly recognized long before the passing of the 29 Car. 2, c. 3, s. 25, by which statute it received a legislative sanction (*s*).

Husband and
wife.

As to husband and wife, even where the marriage was voidable, the survivor, where the marriage remained unquestioned during the lifetime of both parties, was entitled

(*q*) *Ante*, p. 104.

(*r*) See Wms. on Exors., 9th ed.

pp. 355—361.

(*s*) *Ibid.* pp. 346, 347.

to administration, but it was otherwise where the marriage was void *ab initio* (t). Husband and wife. .

“The Married Women’s Property Act, 1882, has not altered the devolution of the undisposed separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed” (u). Position unaltered by Married Women’s Property Act.

“The separate use, whether created by statute or settlement, is exhausted when the wife dies without making a disposition” (x).

There are, however, certain cases in which the Court will pass over the husband without even citing him: as where a wife has obtained a protection order under 20 & 21 Vict. c. 85, s. 21 (y), and, as under this section women who have obtained a protection order are placed in the same position as those who have obtained a decree of judicial separation, it follows that the cases which have been decided under the former head apply equally to the latter. Husband passed over.
20 & 21 Vict. c. 85, s. 21.

Judicial separation.

The same is the case where a woman has obtained a decree for a dissolution of her marriage (z). Dissolution of marriage.

Where a married woman died intestate her whole separate estate being under 20*l.*, and her husband shortly afterwards became a bankrupt and absconded, the Court held that the husband’s right to administration did not Wife dying intestate.

(t) *Ibid.* 348, citing *Elliott v. Gurr*, 2 Phill. 19; *Browning v. Reane*, *ibid.* 69.

(u) Wms. on Exors., 9th ed. p. 347; see also *Lambert, In re; Stanton v. Lambert*, 39 Ch. D. 626; 57 L. J., Ch. D. 927; 59 L. T. 429.

(x) Wms. on Exors., 9th ed. p. 348; citing *Cooper v. Macdonald*, 7 Ch. D. 288.

(y) *In the goods of Worman*, 1 S. & T. 513; 29 L. J., P. & M. 164;

5 Jur., N. S. 687; *In the goods of Faraday*, 2 S. & T. 369; 31 L. J., P. & M. 7; 7 Jur., N. S. 252; *In the goods of Brighton*, 34 L. J., P. & M. 55; *In the goods of Stephenson*, L. R., 1 P. & D. 287; 36 L. J., P. & M. 20; 15 L. T. 296; 15 W. R. 286.

(z) *In the goods of Hay*, 35 L. J., P. & M. 3; 13 L. T. 335; 14 W. R. 147; see also Wms. on Exors., 9th ed. p. 348.

Trustee under husband's bankruptcy. pass to the trustee in bankruptcy under the Bankruptcy Act, 1883, but that there were special circumstances warranting a grant to the trustee under sect. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77) (*a*); and as lately as the year 1890, a grant of administration to the personal estate of a wife was made to the official receiver under her husband's bankruptcy (*b*).

Deed of separation. It was formerly questioned, where a husband by a deed of separation resigned all claim to the property of his wife, how far he was thereby excluded, upon her death in his lifetime, from taking any interest as her representative, and the Court refused to dispense with the citation of the husband (*c*).

Husband covenanting not to claim property in case of wife's intestacy. But in a late case, where a husband covenanted in a deed of separation that if his wife died intestate, her next of kin should be entitled to her property, and she died intestate, leaving separate estate which she had become possessed by virtue of the deed, the Court, notwithstanding that the husband objected, granted administration to her father, limited to such separate estate (*d*).

Husband and wife domiciled in colonies. Where the husband and wife were domiciled in one of the colonies, and the husband had in accordance with the laws of such colony deprived himself by deed of all community in the property of his wife, the Court granted administration to the next of kin of the wife without requiring the husband to be cited (*e*).

Husband convicted of bigamy. Where a husband was convicted of bigamy in respect of his marriage with the intestate, it was held by the Ecclesiastical Court that he might establish his right to administer her effects, on proof that he was not guilty and had been wrongly convicted (*f*).

(*a*) *In the goods of Turner*, 12 P. D. 18; 56 L. J., P. D. & A. 41; 57 L. T. 372; 35 W. R. 384. *phreys v. Allen, or Humphreys, In re*, 8 P. D. 16; 52 L. J., P. D. & A. 24; 48 L. T. 125; 31 W. R.

(*b*) *In the goods of Thacker*, 54 J. P. 759. 292; 47 J. P. 24.

(*c*) *In the goods of Lord Oranmore*, 30 L. J., P. & M. 183.

(*e*) *In the goods of Probart*, 36 L. J., P. & M. 71; 16 L. T. 298; 15 W. R. 798.

(*d*) *Allen v. Humphrys, or Hum-*

(*f*) *Wilkinson v. Gordon*, 2 Add.

The right of a husband to the administration of his deceased wife's effects is such that, on the widower dying without taking out administration to his deceased wife, it survives, and the Court will grant administration to his representative, and not to the next of kin of the wife; unless, indeed, the husband's whole interest determines with his life, in which case the course is to grant administration to the representatives of the wife, as "the grant should follow the interest" (g). Husband's representative.

But if the husband survive the wife and die intestate without administering her estate, his next of kin must constitute themselves his legal personal representatives before they can claim to administer her estate (h). Husband dying without administering.

"It appears to have been ruled in the Prerogative Court that where a husband and wife are drowned in the same ship they must be presumed to have perished at the same moment, unless proof can be obtained as to the exact time of the death of either; at all events, in such cases, in order to entitle the husband to the wife's property it must be proved that he survived her; and consequently the administration thereof must be granted to her next of kin, if his representative cannot give any such proof" (i). Husband and wife commorientes.

In *Huddleston v. Huddleston* (k), the Prerogative Court Grant to

152. See Taylor on Evidence, pt. 3, ch. 5, § 1505. See also Wms. on Exors., 9th ed. p. 349.

(g) *Fielder v. Hanger*, 3 Hagg. 769. See also *In the goods of Gill*, 1 Hagg. 341; *In the goods of Bell*, 1 S. & T. 288; 29 L. J., P. & M. 162; 5 Jur., N. S. 473; 7 W. R. 349; *In the goods of Sowerby*, 2 Curt. 852; *In the goods of Harding*, L. R., 2 P. & D. 394; 26 L. T. 668; 20 W. R. 615; *Partington v. Att.-Gen.*, L. R., 4 H. L. 100; and Wms. on Exors., 9th ed. pp. 349—351.

(h) *In the goods of Crause*, 1 S. &

T. 146.

(i) Wms. on Exors., 9th ed. p. 351.

(k) 2 Robert. 424. Dr. Tristram in the last edition of his work (*Tristram on Probate*, 11th ed.) cites the following unreported cases: (1) *Austen v. Hodges*, Dec. 1860 (*Trist.* p. 109), where a general administration of the effects of a married woman was granted to her next of kin in spite of the opposition of her husband; and (2) *Amelia Vizer*, Aug. 1853 (*Trist.* p. 115), where administration of a wife's estate was granted to the residuary

ante-nuptial
creditor of
wife.

Married
woman domi-
ciled in
Canada.

Since Married
Women's
Property Act,
1882, husband
need not join
in administra-
tion bond.

Widow.
21 Hen. 8,
c. 5.

Court not
bound to
make grant to
widow.

made a grant of administration of the effects of a married woman to one of her ante-nuptial creditors.

Where a married woman domiciled in Canada died intestate leaving children, who were minors, her surviving, the Court, on the affidavit of a member of the Canadian bar that the children and not the husband were by Canadian law entitled to administer the estate of the wife, made the grant to the attorney of the minors (*l*).

Since the Married Women's Property Act, 1882, when a married woman is administratrix, it is no longer necessary that her husband should join in the administration bond (*m*).

If an intestate leave a widow, she is, by the practice of the Court (interpreting the words of 21 Hen. 8, c. 5, "to the widow, *or* to the next of kin, *or* to both, as his discretion shall be thought good") (*n*), entitled to the grant before anybody else, although the next of kin has an equal right under the statute (*o*). Her right is founded on this statute, but there is this difference between her position and that of the widower, viz., that if she die before administration is granted to her, her right is not such a one as will necessarily pass to her representatives.

But it is clear from the wording of the statute (*p*) that the Court is not bound to give the grant to the widow, and therefore under the old law a mandamus did not lie to compel the Ecclesiastical Court to adopt this course, and thus deprive the Ordinary of his discretion (*q*).

It was held in *In the goods of Browning* (*r*), that the

legatee of the husband, on the executor who had proved the will of the latter renouncing administration.

(*l*) *In the goods of Babin*, 59 L. J., P. D. & A. 46; 62 L. T. 185.

(*m*) *In the goods of Ayres*, 8 P. D. 168; 52 L. J., P. D. & A. 98; 31 W. R. 660; 47 J. P. 440.

(*n*) *Ante*, Chap. IX., p. 104.

(*o*) *In the goods of Corser*, 31 L. J., P. & M. 170.

(*p*) *Ante*, Chap. IX., p. 104.

(*q*) See Wms. on Exors., 9th ed. pp. 352—355.

(*r*) *In the goods of Browning*, 2 S. & T. 634; 31 L. J., P. & M. 161; 7 L. T. 217; 10 W. R. 96.

Court is precluded, under 21 Hen. 8, c. 5, from making a joint grant to a widow and one of the persons entitled in distribution (but not next of kin) even with the consent of the next of kin, and of all the other persons entitled in distribution, and that the 73rd section of the Court of Probate Act, 1857, did not enlarge the powers of the Court in this direction. In a later case, however, a joint *grant de bonis non* was made under the 73rd section to a widow and a person entitled in distribution, with the consent of the next of kin, and a distinction was drawn in argument between an application for an *original grant* and a grant *de bonis non* (s).

Joint grant to widow and another with consent of next of kin.

And the Court refused to make a joint grant to the widow and next of kin where no special reason was adduced for making the application (t); but it is otherwise where special grounds are adduced (u).

Joint grant refused to widow and next of kin where no ground shown.

But the Court will, on sufficient cause shown (as, e.g., where the wife has been divorced, or has been living in adultery), pass over the widow in favour of the next of kin (x).

Widow passed over.

Where a woman had been divorced by the High Court of Justice at Bombay, the Court made a grant of administration to the estate of her deceased husband without requiring her to be cited (y).

Divorced wife.

But on an application for a grant to father of an intestate, passing over his widow, against whom misconduct was

Widow against

(s) *In the goods of Grundy*, L. R., 1 P. & D. 459; 37 L. J., P. & M. 21; 17 L. T. 451; 16 W. R. 406.

(t) *In the goods of Newbold*, L. R., 1 P. & D. 285; 36 L. J., P. & M. 14; 15 L. T. 248; 15 W. R. 262.

(u) *In the goods of Richards*, L. R., 2 P. & D. 216; 40 L. J., P. & M. 29; 24 L. T. 142; 19 W. R. 443.

(x) *In the goods of Anderson*, 3 S. & T. 489; 33 L. J., P. & M. 149;

11 L. T. 21. See also *Wms. on Exors.*, 9th ed. p. 355; and see *Conyers v. Kitson*, 3 Hagg. 557; *Lambell v. Lambell*, *ibid.* 568; *In the goods of Moore*, 3 N. of C. 601, where woman claiming to be a widow was not legally married.

(y) *In the goods of Nares*, 13 P. D. 35; 57 L. J., P. D. & A. 19; 58 L. T. 529; 36 W. R. 528; 52 J. P. 231.

whom misconduct alleged.

charged, the Court refused to make the grant without citing the widow (z).

And the Court will not, at any rate without notice, pass over a widow, who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate (a).

Widow in lunatic asylum in colonies.

Where the widow of a deceased intestate was confined in a lunatic asylum in the colonies, the Court allowed the grant of administration to go to one of the children, without going through the form of citing her (b).

Party having prior right to grant must generally be cited.

“It may be expedient to advert to an established rule of the Ecclesiastical Court, viz.:—that wherever a party has a prior right to administer, the Court requires that he should be cited or consent before it will grant administration to any other person, and the rule will not be relaxed notwithstanding the party who has the right has no interest in the property in respect of which the grant of administration is sought. But in cases where the Court has a discretion, viz., in cases where the party entitled in priority is so entitled by the practice of the Court and not by statute, the Court will sometimes dispense with the citation or consent of the party having the prior claim” (c).

Children.

After the widow the children of the intestate are next entitled to a grant of administration of his effects; for, though the children and the parents of the intestate both stand in the first degree from him, yet by our law children are allowed the preference, and so are their descendants, to the remotest degree (d).

Males preferred to females, unless the

In the contest for administration all children stand in equal degree, and *primogeniture* gives no especial right, though, *cæteris paribus*, males are preferred to females,

(z) *In the goods of Middleton*, 14 P. D. 23; 58 L. J., P. D. & A. 28; 60 L. T. 237; 53 J. P. 103.

(a) *In the goods of Ihler*, L. R., 3 P. & D. 50; 42 L. J., P. & M. 18; 28 L. T. 479; 21 W. R. 550.

(b) *In the goods of Jameson*, 46 J. P. 40.

(c) See *Wms. on Exors.*, 9th ed. p. 386.

(d) *Ibid.* pp. 355—387.

unless the latter be the first applicant (or, as it is termed, *latter be prior petens*), in which case they will be entitled to the *prior petens* grant in preference to males (*e*).

“Primogeniture gives no right to preference, so as to weigh against the majority of interests, but if things are precisely equal, if the scale is exactly poised, being the elder brother would incline the balance” (*f*).

In a contest among next of kin equally entitled to the grant, the choice of the fittest person should be made on summons before one of the registrars, and parties improperly brought into Court on motion will be entitled to their costs (*g*).

In giving judgment in *Cordeux v. Trasler* (*h*), Lord Penzance makes the following observations as to the rules which guide the Court as to making a grant of administration where the parties claiming it are in equal degree:—

“In *Iredale v. Ford* (*i*), Sir C. Cresswell said, There are several dicta in the books on the subject of the rules which guide the discretion of the Court in granting administration where the statute does not apply; . . . *cæteris paribus* males are preferred to females, but there is another principle relied on . . . that the grant will follow the majority of interests, and will be made as desired by the majority of interests. I think this is a more stringent rule than the one giving a preference to males over females. There is also another rule which sometimes guides the Court, . . . namely, that the

(*e*) Ibid.; see *Earl of Warwick v. Greville*, 1 Phill. 126; *Cordeux v. Trasler*, 4 S. & T. 48; 34 L. J., P. & M. 127; 11 Jur., N. S. 587; see also *Chittenden v. Knight*, 2 Cas. temp. Lee, 559.

(*f*) Wms. on Exors. 9th ed., p. 363.

(*g*) *In the goods of John*, 58 L. T. 683; 52 J. P. 232.

(*h*) 34 L. J., P. & M. at p. 128.

(*i*) 1 S. & T. 305; 5 Jur., N. S. 474; 7 W. R. 462; see also *Brenchley v. Lynn*, 2 Rob. 470; 16 Jur. 226. The rule of making the grant to the largest interest was the practice of the Ecclesiastical Court, but it was in no way compulsory: see *Cardell v. Harvey*, 1 Lee, 179; and as to males being preferred to females, see *Leggatt v. Leggatt*, 1 Lee, 349.

*Priores
petentes.*

grant will be made *priori petenti*. It is difficult to weigh with great exactitude the merits of the respective applicants for a grant, nor is it necessary to do so, because, provided the Court is satisfied that the person it selects is responsible, and is able and willing to give security, the object of the grant is achieved."

Grant not
made to more
than three
persons.

The grant is made of the whole administration, and no power is reserved for other administrators to come in and join as in the case of executors. Another rule is, that when several apply, the Court will not grant letters of administration to more than three persons, unless, indeed, some special circumstances induce it to forego the general rule. Indeed the Court never makes a joint grant if it can possibly avoid it, and "*à fortiori*, the Court never forces a joint administration upon unwilling parties" (*i*).

Sole preferred
to joint grant.

"Administrators must join and be joined in every act, which would not only be inconvenient to themselves, but, what is of more consequence, inconvenient to those who have demands on the estate either as creditors or as entitled in distribution" (*k*).

When ad-
ministrator
once ap-
pointed, no
right to other
next of kin to
take adminis-
tration during
his life.

"When administration has once been committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant; so different in this case from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. . . . But a next of kin who has even renounced may, upon the death of the party appointed administrator, come in and take administration *de bonis non*" (*l*).

Joint grant
refused.

Where the widow of an intestate, who was entirely unacquainted with the management of the business of her late husband, applied that his brother, who had been

(*i*) Wms. on Exors. 9th ed., p. 364; see also *Walker v. Carless*, 2 Lee, 560; *In the goods of Naylor*, 2 Rob. 410; 15 Jur. 686.

(*k*) *Earl of Warwick v. Greville*, 1 Phill. 126.

(*l*) Wms. on Exors. 9th ed., p. 364; see also *post*, Chap. XVIII.

his assistant, might be joined in the grant of administration so as to assist her in carrying on the business for the benefit of herself and her husband's children (who were minors) by a former marriage, the Court refused to make a joint grant, but suggested that the widow might renounce her right, and so enable the brother to take the grant as guardian of the minors (*m*).

To brother of deceased on renunciation of widow.

Where a child was born six months only after the marriage of her parents, the Court made a grant of administration to her, as the "*natural and lawful child*" of the deceased (*n*).

"Natural and lawful" child.

Where administration is contested by two persons of the whole blood in equal degree of relationship, the rule is to grant it to the one who unites the majority of interests; but where the contest is between one of the whole blood and one of the half-blood, the one of the whole blood is to be preferred (*o*).

Half-blood.

It has been held in the Chancery Division that the word "children" in the Statute of Distributions means only "children" according to the law of England. Therefore, children legitimized by the subsequent marriage of their parents, according to the law of the country of their parents' domicile, are nevertheless illegitimate here (*p*).

Children legitimized by law of parents' domicile.

Administration was granted to a nephew, on the renunciation of his father, the brother and sole next of kin of the deceased (*q*).

To others than next of kin.

(*m*) *In the goods of Richards*, L. R., 2 P. & D. 216; 40 L. J., P. & M. 29; 24 L. T. 142; 19 W. R. 443.

v. Wraby, cited Trist. on Prob. 11th ed. 216.

(*n*) *Turnock v. Turnock*, 36 L. J., P. & M. 85; 16 L. T. 611; citing *Rex v. Luffe*, 8 East, 192; *S. C.*, 25 L. J., Ch. 125; *Legge v. Edwards*, 25 L. J., Ch. 125.

(*p*) *In re Goodman's Trusts*, 14 Ch. D. 619. Dr. Tristram, commenting on this case, says, "It would seem that the Probate Division would refuse administration to such a child, as not being next of kin." (Trist. on Prob. 11th ed., p. 228.) As far as I know, however, the question has not yet been tested.—L. D. P.

(*o*) Wms. on Exors. 9th ed., p. 363. See also *Mercer v. Morland*, 2 Cas. temp. Lee, 500; *Cartwright's case*, 1 Freeman, 258; *Stratton v. Linton*, 31 L. J., P. & M. 48; *Field*

(*q*) *In the goods of Keane*, 1 Hagg.

Nephew of
next of kin.

But in *Gibbon's Case* (*r*) the Court refused to make a grant in favour of the nephew of the intestate's next of kin on the ground that his chance of succeeding to the estate was too remote, but allowed the daughter of such next of kin to take the grant.

Nominee of
next of kin.

The next of kin cannot, as it were, indorse away their right to a nominee. For the Court refused to grant administration to a person not having any interest in the estate merely because the next of kin had agreed to renounce in his favour (*s*).

But it is otherwise if circumstances exist to justify a grant under sect. 73 of the Probate Act, 1857 (*t*); as to which, see *post*, pp. 228—231.

Where a will
is supposed
to be in
existence.

Even where a will is supposed to exist administration may be granted to the next of kin, if the executors of such supposed will and the other parties interested under it have been cited and have not appeared (*u*).

Rights of
crown.

Where there are no next of kin, the crown is entitled to the grant, in accordance with both the feudal principle of escheat and the maxims of the civil law. As a bastard is *nullius filius*, he can have no next of kin, unless he leaves lawful issue. When, therefore, a bastard dies unmarried, his effects revert to the crown; but where a will does not dispose of the residue, the legatees are entitled to adminis-

692; *In the goods of Johnson*, 2 S. & T. 595; 7 L. T. 337; L. R., 2 P. & D. 81; 39 L. J., P. & M. 48; 22 L. T. 630; 18 W. R. 844. See also the following unreported cases cited in Tristram on Probate, 11th ed.:—*H. J. Cookson*, p. 116; *John Scale*, p. 117; *Theodora Garland*, p. 210, where there was a grant to a great-niece and cousin german under special circumstances; and *Roëters v. Cotton*, p. 116, where a grant was made to the sister of the deceased in the father's lifetime, the latter having renounced.

(*r*) See Trist. on Prob. 11th ed., p. 117, referring to Waddilove's Digest, p. 9, s. 56.

(*s*) *In the goods of Blake*, 35 L. J., P. & M. 91; 14 L. T. 769; 14 W. R. 1021.

(*t*) *In the goods of Clayton*, 11 P. D. 76; 55 L. J., P. D. & A. 26; 34 W. R. 444; 50 J. P. 263. For a case where a grant was made in favour of the assignee of a sole next of kin who had renounced, see *Almes v. Almes*, 2 Hagg. 215.

(*u*) See *Whiting v. Deal*, 2 Sp. 57; *Perry v. Dyke*, 1 S. & T. 12; *Morton v. Thorpe*, 3 S. & T. 181.

tration with the will annexed, limited to the property disposed of by the will; the next of kin without the consent of the legatees being only entitled to a grant, save and except such property, or to a *cæterorum* grant. If the deceased dies a bastard and unmarried, the crown takes the same grant as next of kin (*x*). Rights of crown.
Bastard.

The practice of the crown is to divide the effects of an intestate bastard among the natural relatives, and to retain only a percentage as under (*y*):— ROYAL WARRANT, JULY 25TH, 1771.

If property under £500	.	.	.	One-tenth.
„ „ 1,000	.	.	.	One-eighth.
„ „ 5,000	.	.	.	One-sixth.
„ „ 10,000	.	.	.	One-fourth.
If £10,000 or upwards	.	.	.	One-third.

“By stat. 39 & 40 Vict. c. 18, the Treasury Solicitor Act, 1876 (which, by sect. 9 repeals the former statute, 15 Vict. c. 3), the Treasury Solicitor is constituted a corporation sole with certain powers and liabilities (sect. 1). 39 & 40
Vict. c. 18,
s. 1, where
crown entitled
to personal
estate.

“Where the crown becomes entitled to the personal estate of an intestate, and the Court has power to grant administration to a nominee of the crown, and where the crown nominates for that purpose the Treasury Solicitor, the Court may grant administration for the use of the crown to the Treasury Solicitor (by his official name), and his successors, or to some person nominated by the Treasury Solicitor (sect. 2). Sect. 2.

“The administration when granted to the Treasury Solicitor, and the office of administrator under such grant, and all the estates, rights, duties, and liabilities of such administrator are vested in and imposed on the Treasury Solicitor for the time being without any further grant of administration (sect. 2). Sect. 2.

“The Treasury Solicitor may be nominated as administrator either in any particular case or class of cases, or in

(*x*) In the goods of *Rhoades*, L. R., (*y*) See ROYAL WARRANT, 25th
1 P. & D. 119; 35 L. J., P. & M. July, 1771.

39 & 40 Vict. c. 18, s. 2. all cases, and such nomination may be limited as to her Majesty may seem fit, and the Treasury Solicitor may be authorized to nominate some other person to take out administration in any particular case or class of cases.

“The Treasury Solicitor, notwithstanding that he does not give the bond which, if such administration were granted to him as a private individual he would be required by law to give, is subject as regards the administration to the liabilities and duties imposed by such bond (sect. 2).

Sect. 4. “Sect. 4 deals with the disposal of money and property received under an administration or forfeiture, and of unclaimed grants.

Sect. 5. “Sect. 5 provides for the making of rules by the Treasury.

Sect. 6. “Sect. 6 applies the Act to previous administrations, &c.

Sect. 9. “Sect. 9 (1) provides for the re-enactment of sect. 2 of
Duchy of Lancaster. stat. 15 & 16 Vict. c. 3 (repealed as above stated), viz., that ‘where the administration of the personal estate of any deceased person has been granted to the solicitor for the affairs of her Majesty’s Duchy of Lancaster for the use of her Majesty, that solicitor shall, notwithstanding that he does not give the bond which, if such administration had been granted to him as a private individual, he would be required by law to give, be subject as regards the administration to the liabilities and duties imposed by such bond’ ” (y).

Seaman bastard. A general grant of administration of the effects of a seaman in the navy, who died a bachelor, bastard and intestate, having wages or prize money due to him, will not be granted to the solicitor of the Treasury for the use of the crown, unless the provisions of the 11 Geo. 4 & 1 Will. 4, c. 20, s. 56, have been complied with, those provisions, although they do not in terms affect the crown, being binding on the Court of Probate (z).

(y) See Wms. on Exors. 9th ed., pp. 371, 372. 15; 13 L. T. 608; 11 Jur., N. S. 982; 14 W. R. 147. And see,

(z) *In the goods of Bevan*, L. R., 1 P. & D. 15; 35 L. J., P. & M. as to administration of effects of deceased seamen, *post*, Chap. XXI.

Where a bastard died within the limits of the Duchy of Cornwall, the Court made the grant to the solicitor of the duchy for the use and benefit of H.R.H. the Prince of Wales as Duke of Cornwall, but without prejudice to the rights of the crown (a).

Duchy of Cornwall.
Goods of deceased bastard.

Where a grant is applied for in respect of an intestate's effects on behalf of H.R.H. the Prince of Wales as Duke of Cornwall, it is not necessary, if the effects are sufficiently set forth in the warrant, that they should be verified by affidavit (b).

Sect. 1 of 33 & 34 Vict. c. 23, the statute abolishing forfeiture for felony, has put an end to all the old law as to taking out administration to a deceased felon's effects, and places them on the same footing as other persons.

"By the Intestates' Estates Act, 1884, 'Where the administration of the personal estate of any deceased person is granted to a nominee of her Majesty (whether the Treasury Solicitor or a person nominated by the Treasury Solicitor, or any other person) any action or proceeding by or against such nominee for the recovery of the personal estate of such deceased person, or any share thereof, shall be of the same character and be brought, instituted, and carried on in the same manner, and be subject to the same rules of law and equity (including the rules of limitation under the Statute of Limitations or otherwise) in all respects as if the administration had been granted to such nominee as one of the next of kin of such deceased person' (sect. 2).

Intestates' Estates Act, 1884.
Sect. 2.

"Sect. 3 enacts that 'after the passing of this Act, an information or other proceeding on the part of her Majesty shall not be filed or instituted, and a petition of right shall not be prosecuted in respect of the personal estate

Sect. 3.

(a) *In the goods of Canning*, 5 P. D. 114; 41 L. T. 737; 28 W. R. 278. And see further on this subject, *post*, Chap. XXI.

(b) *In the goods of Griffith*, 9 P. D. 63; 53 L. J., P. D. & A. 30; 32 W. R. 524; 48 J. P. 312.

Intestates'
Estates Act,
1884.

of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject.'

Sect. 4.

"Sect. 4 enacts that 'from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments.'

Sect. 5.

"Sect. 5 gives to the Court a power of sale of the interest of the crown in any hereditament corporeal or incorporeal, and directs that the proceeds of such sale shall be paid, invested, and disposed of in manner provided by sect. 4 of the Treasury Solicitor Act, 1876. It further applies the provisions of sect. 1 of the Trustee Act, 1850, to such sale.

Sect. 6.

"Sect. 6 gives to the crown power to waive its right to the real estate of an intestate in certain cases.

Sect. 7.

"Sect. 7 defines an intestacy for the purposes of the Act as 'Where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person was legal or equitable, is owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of, such person shall be deemed to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of.'

Sect. 8.

"Sect. 8 applies the Act to the Duchy of Lancaster.

Sect. 9.

"Sect. 9 applies the Act to Ireland" (d).

If an intestate was domiciled in a foreign country, whether a foreigner or a British subject, or in her Majesty's dominions out of England, and has left assets here in England, administration must be taken out to his estate in this country (*e*).

Intestate
domiciled
abroad, assets
in England.

"By stat. 24 & 25 Vict. c. 121, s. 4, 'Wherever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette, it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state, within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts or funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such Court shall seem fit' (*f*).

24 & 25 Vict.
c. 121, s. 4,
foreigner
dying in Eng-
land.

If the next of kin die before he has obtained administration, his representative is entitled to the grant. And if he so die, payment to him in his lifetime is no answer to an action by his representative as administrator to the original intestate. Further, it must be remembered that

Next of kin
dying before
grant.

(*e*) See, on this subject, Wms. on Exors. 9th ed., pp. 365—369; see also *post*, Chap. XVIII.

(*f*) Wms. on Exors. 9th ed., p. 367.

Person entitled not bound to take grant.

though an executor who has intermeddled with the estate is bound to take probate, a person entitled to administration as next of kin to the estate of an intestate is not so bound, even though he may have intermeddled with the estate (*g*).

Attorney of next of kin. Probate Rules (Non-Contentious Business), r. 32.

“Administration may be granted to the attorney of all the next of kin, provided they reside out of the country, and if the effects are under 20*l*. such administration may be granted whether they are so resident or not. By rule 32, Probate Rules (Non-Contentious Business), ‘In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney acting under a power of attorney’” (*h*).

Such grant will be made to the agent on the same terms as it would have been made to the party himself (*i*).

Attorney may be resident out of jurisdiction, but not sureties.

The Court will make the grant even though the attorney be resident out of the jurisdiction, provided the sureties be resident within the jurisdiction (*k*).

Although the rules require a regularly executed power of attorney, the Court will sometimes waive this, if satisfied on the document before it, that the party entitled to a

(*g*) See Wms. on Exors. 9th ed., p. 375.

(*h*) Wms. on Exors. 9th ed., pp. 376 *et seq.* For instances of such grants, see *In the goods of Bianchi*, 1 S. & T. 511; 28 L. J., P. & M. 139; *In the goods of O'Brien*, 2 S. & T. 604; 31 L. J., P. & M. 194; 7 L. T. 249; *In the goods of Jones*, 28 L. J., P. & M. 80; *In the goods of Rosser*, 33 L. J., P. & M. 155; 10 L. T. 695; 12 W. R. 1014; *Collison v. Marwe*, 28 L. J., P. & M. 90; *In the goods of Escott*, 4 S. & T. 186; 28 L. J., P. & M. 17; *In the goods of Fletcher*, 8 Jur., N. S. 572; *In the goods of Shepherd*, 26 L. T. 405; *In the goods of Rule*,

4 P. D. 76; 47 L. J., P. D. & A. 32; 39 L. T. 123; 26 W. R. 357; *In the goods of Halliwell*, 10 P. D. 198; 54 L. J., P. D. & A. 32; 33 W. R. 371; 49 J. P. 233. And see *post*, Chap. XVIII.

(*i*) *In the goods of Goldsborough*, 1 S. & T. 295; 5 Jur., N. S. 417; 7 W. R. 375.

(*k*) *In the goods of Leeson*, 1 S. & T. 463; 29 L. J., P. & M. 19; 5 Jur., N. S. 1270; 1 L. T. 74. The Court will, however, sometimes accept sureties resident out of the jurisdiction. See *In the goods of Ballingall*, 3 S. & T. 441, note; 32 L. J., P. & M. 138; 9 L. T. 116; 11 W. R. 591.

grant of administration desires the person applying to act as his attorney (*l*).

Power of attorney not always required.

But when the persons entitled to administration are in England, a grant will not be made to their attorney (*m*), unless the estate consists solely of property held in trust (*n*).

Attorney of next of kin.

The next of kin of an intestate are entitled to administration in preference to creditors, even where the estate is insolvent; and another general rule is, that creditors are not entitled to require the next of kin, or the guardian of the next of kin, to give justifying security, and that a very strong case must be made out before a departure from this rule can be allowed (*o*).

Grant to creditor.

A person who is entitled to administration as next of kin cannot take the grant as a creditor (*p*).

In *Hawke v. Wedderburne* (*q*), Lord Penzance says:—

Right of creditor.

“The principles upon which this Court has made grants to creditors are explained in *Dabbs v. Chisman* (*r*); *Elme v. Da Costa* (*s*); and *Menzies v. Pulbrook* (*t*).

Hawke v. Wedderburne.

Per Lord Penzance.

“The right of a creditor is only this: he cannot be paid his debt till a representation to the deceased is made; he can then call on all who have a right to administer; before an administration is granted, if a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims administration,

(*l*) *In the goods of Morley*, 3 S. & T. 425; 33 L. J., P. & M. 108; 10 L. T. 540; 12 W. R. 1064. See also *In the goods of Elderton*, 4 Hagg. 210; *In the goods of Ormond*, 1 Hagg. 146; *In the goods of Boyle*, 3 S. & T. 427.

(*m*) *In the goods of Burch*, 2 S. & T. 139; 30 L. J., P. & M. 171; 4 L. T. 451; 9 W. R. 639.

(*n*) *In the goods of Bullar*, 39 L. J., P. & M. 26; 22 L. T. 146.

(*o*) *John v. Bradbury*, L. R., 1 P. & D. 245; 36 L. J., P. & M. 33; 15 L. T. 414; 15 W. R. 285. See also *Graham v. Maclean*, 2 Curt. 663; *Dimes v. Cornwall*, 7 N. of C. 381; 2 Rob. 142.

(*p*) *In the goods of Corser*, 31 L. J., P. & M. 170.

(*q*) L. R., 1 P. & D. at p. 595.

(*r*) 1 Phill. at p. 159.

(*s*) 1 Phill. at p. 177.

(*t*) 2 Curt. at p. 848.

Creditor.

then a person offers to make himself a representative, and the creditor gets all he has a right to" (u).

It may be taken as a general rule that the Court will not grant administration to a creditor where the parties entitled to the grant are willing to take it; and this is so even where the estate is insolvent, and still more so where such insolvency is disputed (x).

All parties interested must be cited.

And it may be further taken as a general rule that the Court will not grant administration to a creditor unless all the next of kin and parties interested in the grant have been duly cited and had an opportunity of appearing to dispute the claim of such creditor, and that, except by leave of the Court, such citations must be personally served (y).

Next of kin abroad, or no address.

When the next of kin are abroad or have no known address, and fail to appear to a citation by advertisement, an affidavit that service of the citation has been attempted and failed, and that the deceased's next of kin have no known agent in England, is requisite (z).

Affidavit by creditor.

In default of appearance by the next of kin, the creditor's application must be accompanied by an affidavit of the nature and amount of his debt, and the date when it occurred (a).

Creditor having obtained grant may dispute will.

Although a creditor cannot dispute the validity of a will before administration granted, if he succeed in obtaining a grant, he has a right to dispute a will if one be afterwards set up (b).

(u) *Elme v. Da Costa*, 1 Phill. at p. 177; see also *Burroughs v. Griffiths*, 1 Cas. temp. Lee, 544; *Webb v. Needham*, 1 Add. 497.

(x) *Stretch v. Pynn*, 1 Cas. temp. Lee, 30; *Hawke v. Wedderburne*, L. R., 1 P. & D. 594; 37 L. J., P. & M. 33; 18 L. T. 336; 16 W. R. 712.

(y) See *Wms. on Exors.* 9th ed.,

pp. 378, 379.

(z) *In the goods of Von Desen*, 43 L. T. 352. See also *Brown v. Wildman*, 28 L. J., P. D. & A. 54.

(a) *In the goods of Von Desen*, *ubi supra*. See *Rawlinson v. Burnell*, 3 S. & T. 479; 33 L. J., P. & M. 123; *Aitkin v. Ford*, 3 Hagg. 194.

(b) See *Elme v. Da Costa*, 1 Phill.

A creditor, however, is entitled to an inventory of the effects of an intestate. And it is sufficient if the creditor swear to a particular sum *and upwards* being due to him, as the Court will not try the validity of the debt, and, though he has a right to call for an inventory, the Court has no jurisdiction at his suit to examine the particulars of an account (*c*).

Creditor entitled to inventory of effects.

A surety who, *after the death of the principal*, pays off the debt is entitled to administration as a creditor (*d*). But administration of an intestate's estate will not be granted to a person who, after the death of the intestate, buys up a debt due from him (*e*). Even if his debt is barred by the Statute of Limitations, a creditor is allowed to cite the next of kin to accept administration, or to show cause why it should not be granted to him (*f*). And, on their not appearing, he is entitled to the grant, but the bond must contain a condition that he distribute the assets rateably amongst all the creditors (*g*), and, for the future, any creditor on taking out administration must in all cases, if required by the Court, enter into a bond conditional to administer the estate rateably among the creditors of the deceased (*h*).

Creditor, what is.

Where an application is made for a grant of administration to the secretary of an association, on the ground that the deceased was indebted to the association, the Court

Secretary of an association.

173; *Menzies v. Pulbrook*, 2 Curt. 851; *Dabbs v. Chesman*, 1 Phill. 159; *Norman v. Bourne*, *ibid.* 160 (note *c.*); Wms. on Exors. 9th ed., p. 382.

(*c*) *Timbrell v. Rice*, 1 Cas. temp. Lee, 471; *Smith v. Pryce*, *ibid.* 569; *Brown v. Atkins*, 2 Cas. temp. Lee, 1. See also *Bouverie v. Maxwell*, L. R., 1 P. & D. 272; 36 L. J., P. & M. 3; 15 L. T. 295; 15 W. R. 89.

(*d*) *Williams v. Jukes*, 34 L. J., P. & M. 60.

(*e*) *Macnín v. Coles*, 33 L. J., P. & M. 175; see also *Depit v. Delevieuleuse*, 30 L. J., P. & M. 86.

(*f*) *In the goods of Coombs*, L. R., 1 P. & D. 193; 35 L. J., P. & M. 78; 14 L. T. 635; 14 W. R. 975.

(*g*) *Coombs v. Coombs*, L. R., 1 P. & D. 288; 36 L. J., P. & M. 21; 15 W. R. 286.

(*h*) *In the goods of Brackenbury*, 2 P. D. 272; 46 L. J., P. D. & A. 42; 36 L. T. 744; 25 W. R. 698.

Grant to as
creditor.

ought to have such information of the constitution of the association as would show that the secretary can be treated as a creditor (*i*).

Grant to
guardians of
union.

Administration may be granted to the guardians of a union, as creditors, of the effects of a pauper dying chargeable to the union, under 12 & 13 Vict. c. 103, s. 16 (*k*).

12 & 13 Vict.
c. 103, s. 16.

By sect. 16 of 12 & 13 Vict. c. 103, it is enacted "in the event of the death of any pauper having in his possession, or belonging to him, any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in or about the maintenance of such pauper at any time during the twelve months previous to the decease."

Deceased for
six years in
county
lunatic
asylum.

Where the deceased had for over six years been supported in the county asylum as a pauper lunatic, and after her death the guardians for the first time discovered that she had been entitled to a Government annuity of £24 16s. 6d., the Court made a grant to the guardians under the above section (*l*).

A similar grant was made where all the next of kin renounced their right, and one brother who was in America was cited in America and had not appeared (*m*).

Husband of
deceased cre-
ditor.

A husband of a deceased creditor is not entitled to a grant of administration to the estate of an intestate as a creditor. He may, however, be entitled to a grant *de bonis non* as the representative of his wife (*n*).

(*i*) *In the goods of Fairweather*, 2 S. & T. 588; 6 L. T. 788; 10 W. R. 862. Dr. Tristram cites an unreported case of *Angas v. Henderson* (Trist. on Prob. 11th ed., p. 121), where a grant was made to the official manager of a joint stock company that was winding up.

(*k*) *Cleaver v. Next of kin of McKenna*, 35 L. J., P. & M. 91; 13 L. T. 411.

(*l*) *Lambeth Guardians v. Bradshaw*, 57 L. T. 86; 50 J. P. 472.

(*m*) *In the goods of Byrne*, 52 J. P. 281. See also *In the goods of Luce*, 54 J. P. 695; *Windeatt v. Sharland*, 2 L. R., P. & D. 266; 40 L. J., P. & M. 21; 25 L. T. 574; 20 W. R. 211.

(*n*) *In the goods of Risdon*, L. R., 1 P. & D. 637; 38 L. J., P. & M. 40; 20 L. T. 330; and see *post*, Chap. XVII.

It is the established practice of the Court of Probate to refuse a grant as creditor to a person who has bought up a debt after the death of the deceased (*o*). Creditor who has bought up debt.

The Court may make a grant of administration to the mortgagee of a creditor (*p*), or, if he be bankrupt, to his assignees or trustees (*q*). Mortgagee of creditor.
Assignees or trustees in bankruptcy.

The Court granted administration (the next of kin having renounced) of the personal estate and effects of an insolvent intestate, to a stranger nominated by the bulk of the creditors, in preference to a particular creditor, whose debt was small, but required the nominee to give justifying security, and to enter into a bond to pay the debts *pro rata* (*r*). To nominee of creditors.

Where an intestate was the holder of shares on which a call was made after his death, the Court made a grant as creditor to a nominee of the company (*s*). To nominee of company.

Administration may be granted to one creditor of the deceased, though the proceedings for obtaining administration may have been initiated by another creditor: the latter being allowed such costs as were reasonably incurred by him, before the former took up the application (*t*). One creditor commencing proceedings, grant to another creditor.

Where an executrix who had intermeddled without taking probate died possessed of property belonging to

(*o*) See Wms. on Exors. 9th ed., p. 380. See also *Baynes v. Harrison*, 1 Dea. 16; and *Harrison v. Allpers*, 2 Phil. 249.

(*p*) *In the goods of Godfrey*, 2 S. & T. 133; 3 L. T. 895; 9 W. R. 499.

(*q*) *In the goods of Coles*, 3 S. & T. 181; 33 L. J., P. & M. 175; 9 L. T. 519; 9 Jur., N. S. 1080; *In the goods of Burdett*, L. R., 1 P. D. 427; 45 L. J., P. & M. 71; 34 L. T. 855. But see *Drew v. Long*, 1 Sp. 400; *Belcher v. Maberley*, 2 Curt. 629.

(*r*) *In the goods of Smithson*, 36 L. J., P. & M. 77; 15 L. T. 296.

(*s*) *Tomlinson v. Gilbey*, 54 L. J., P. D. & A. 80; 33 W. R. 800; 49 J. P. 632.

(*t*) *Andrews v. Murphy*, 4 S. & T. 198; 30 L. J., P. & M. 37. For other cases in which grants have been made to creditors, see *Meek v. Durham*, 19 W. R. 391; *S. C.*, *In the goods of Durham*, 24 L. T. 73; *In the goods of Bateman*, L. R., 2 P. & D. 242; 40 L. J., P. & M. 24; 24 L. T. 399; 19 W. R. 759; and see Wms. on Exors. 9th ed., p. 378.

Executrix intermeddling dying possessed of property belonging to testator.

Claim in nature of damages.

Contest between creditors in Ecclesiastical Courts.

No relatives, notice to Queen's Proctor.

Party without interest.

her testator; the Court, after citation and non-appearance of her next of kin, granted general letters of administration to her estate to the representative of the testator (*u*).

Where an applicant claimed administration as a creditor on the strength of a verbal promise by the deceased to leave her his property if she would go and take care of him, and she had only ceased to live with him in consequence of his making her improper overtures; the Court held this was a claim in the nature of damages, and that the applicant must first establish it and its amount, before she could ask for administration as a creditor (*x*).

Where there was a contest between creditors in the Ecclesiastical Courts as to who should take a grant to the estate of a deceased intestate, the creditor having the largest claim was preferred, and, as a rule, a judgment creditor was preferred to any other (*y*); though the latter rule was liable to exceptions (*z*).

If a creditor applies and there are no known relatives of the deceased, the applicant gives notice of the application to the Queen's Proctor, who, if he does not oppose, signifies the same to the applicant by letter (*a*).

Where the next of kin and the persons entitled to distribution renounce their rights, the Court may grant administration of the effects of an intestate to a person, who, if the next of kin had been out of the way, would have been next of kin, even though such person may have no interest in the estate (*b*).

(*u*) *In the goods of Mellor*, or *Mellor v. Dyson*, 8 P. D. 108; 52 L. J., P. D. & A. 62; 31 W. R. 476; 47 J. P. 280.

(*x*) *In the goods of Clook*, 62 L. T. 607.

(*y*) *Kearney v. Whitaker*, 2 Lee, 325; *Carpenter v. Shelford*, *ibid.* 503.

(*z*) *Ernest v. Eustace*, 1 Dea. 273. And see the following further cases on the subject generally: *Colvin v. Queen's Proctor*, 1 Hagg. 93; *In the*

goods of Penny, 1 Rob. 426; *In the goods of Noel*, 4 Hagg. 208.

(*a*) For the practice as to this, see *post*, Chap. XX. See also *Clayton v. Browne*, 28 L. J., P. & M. 126.

(*b*) *In the goods of Keane*, 1 Hagg. 692; *In the goods of Johnson*, 2 S. & T. 595; 7 L. T. 337. See also *In the goods of Hopkins*, L. R., 3 P. & D. 235; 44 L. J., P. & M. 42; 33 L. T. 320. See also *Wms. on Exors.* 9th ed., pp. 382, 383.

And the Court ordered a citation to issue against the only person interested in the estate of the deceased, calling upon him to take administration, on the application of a party who was interested in the due prosecution of a suit in Chancery, for which purpose a representative of the deceased's estate was required (c).

Party interested in Chancery suit.

"Or the Court may *ex officio* grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the deceased. In a case where a sole next of kin refused to take administration, the Court decreed letters of administration to a person who had been her agent, limited to the collection of all the personal property of the deceased and giving discharges for the debts which might have been due to the estate on the payment of the same, and doing what further might be necessary for the preservation of the property aforesaid, and to the safe keeping of the same to abide the directions of the Court" (d).

Grant *ad colligendum bona defuncti*.

The Court may (if necessary) appoint a personal representative to a person who has been killed by a railway accident, for the purpose of bringing an action for the benefit of the wife of the deceased (e).

Representative to bring action for damages.

The proceeds of real estate held under the Settled Estates Act, and not yet converted into personalty, have not yet become personal estate in respect of which letters of administration can be granted (f).

Proceeds of realty.

(c) *In the goods of Williams*, L. R. 2 P. & D. 81; 39 L. J., P. & M. 48. See also *In the goods of Blaggrave*, 2 Hagg. 83; *In the goods of Allen*, 3 S. & T. 559.

84; 7 L. T. 565; 11 W. R. 218; *In the goods of Clarkington*, 2 S. & T. 380; 8 Jur., N. S. 34; 7 L. T. 218; 10 W. R. 124; *In the goods of Ashley*, 15 P. D. 120; 59 L. J., P. D. & A. 72. See also *post*, Ch. XVIII.

(d) *Wms. on Exors.*, 9th ed. pp. 382, 383; citing *In the goods of Radnall*, 2 Add. 232. See also *In the goods of Schwerdtfeger*, 1 P. D. 424; 45 L. J., P. D. & A. 46; 34 L. T. 72; 24 W. R. 298; *In the goods of Stewart*, L. R., 1 P. & D. 727; 38 L. J., P. & M. 39; *In the goods of Wychoff*, 3 S. & T. 20; 32 L. J., P. & M. 214; 9 Jur., N. S.

(e) See *Barnes v. Ward*, 9 C. B. 392; *Blake v. Midland Ry. Co.*, 21 L. J., Q. B. 233. See also 9 & 10 Vict. c. 93.

(f) *In the goods of Lloyd*, 9 P. D. 65; 53 L. J., P. D. & A. 48; 32 W. R. 724; 48 J. P. 456.

Deceased leaving will marked with insanity.

Where a testator died insane, leaving a will showing signs of insanity on the face of it, the Court made a grant of administration as though the deceased had died intestate, but ordered the will to be filed (*g*).

Birth or death of child.

Upon an application for administration to the estate of a child, the Court ordered the birth and death of the child to be proved by declarations of its deceased mother (*h*).

No second grant till existing grant revoked.

Where there is an existing grant of administration, the Court will not make a second grant until the existing grant has been revoked (*i*).

C. P. Act, 1857, s. 73, grants under.

By the 73rd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77) (*k*), the most extensive powers have been conferred on the Court to make, under any special circumstances, any grant which, in any particular case, it may think fit.

Must be to person other than person entitled.

But it must be observed that the grant under sect. 73 must be made to a person "other than the person who, if this Act had not been passed, would by law have been entitled to the grant."

Cannot be to next of kin, passing by widow;

Therefore, a grant cannot be made, under this section, to the next of kin, passing by the widow; since by 21 Hen. 8, c. 5, both are equally entitled to the grant, although the practice of the Court is to make the grant to the widow only (*l*).

or joint to widow and one of next of kin.

And the Court is precluded by this statute from making a joint grant to the widow and one of the persons entitled in distribution, even with the consent of the next of kin and of all the other persons entitled in distribution, and this section does not enlarge the powers of the Court in such a case (*m*).

(*g*) *In the goods of Bourget*, 1 Curt. 591.

78; 63 L. T. 464; 39 W. R. 80.

(*h*) *Ante*, p. 179.

(*h*) *In the goods of Thompson*, 12 P. D. 100; 56 L. J., P. D. & A. 46; 57 L. T. 373; 35 W. R. 384.

(*l*) *In the goods of Corser*, 31 L. J., P. & M. 170.

(*i*) *In the goods of Hornbuckle*, 15 P. D. 149; 59 L. J., P. D. & A.

(*m*) *In the goods of Browning*, 2 S. & T. 634; 31 L. J., P. & M. 161; 7 L. T. 217; 10 W. R. 96.

Neither will the Court grant administration under this section to a person entitled to the grant in another character—as a creditor (*n*), nor to the nominee of the persons entitled to the grant (*o*).

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 73, grants under.

In *Farrell v. Brownbill* (*p*), the Court did make such a grant, but the circumstances of that case are thus explained by Lord Penzance in *Teague v. Wharton* (*q*). “In that case the next of kin had entered into litigation as to the person who should take administration; a petition and answer had been filed, and other pleadings had followed, when finally the parties came to an arrangement to stop litigation; and in order to carry it out, the Court made a grant to a nominee of the litigants under the 73rd section of the Probate Act. I decided that case on the authority of one cited, *In the goods of Joshua Holroyd*, which has not been reported. I have, however, sent for the papers therein, and I find the next of kin joined in a request that the administration should be granted to a particular individual, on the special ground that that individual was the executor under their father’s will, and that the property to be administered in reality was part of their father’s estate. It was, therefore, reasonable that the executors should continue to administer the property; but that case is no authority for the general proposition that if all the next of kin agree to nominate some person to take administration in their place, the Court will make a grant to such nominee” (*r*).

To nominees of parties interested.

Teague v. Wharton, per Lord Penzance.

And a grant with the will annexed was made in 1886, under this section, where the estate was insolvent, to the nominees of the creditors who they desired should carry

To creditors to carry on business of deceased.

(*n*) *In the goods of Fairweather*, 2 S. & T. 588; 6 L. T. 788; 10 W. R. 862.

J., P. & M. 13; 25 L. T. 764; 20 W. R. 214.

(*o*) *In the goods of Hale*, L. R., 3 P. & D. 207; 44 L. J., P. & M. 45; 31 L. T. 799; *Teague v. Wharton*, L. R., 2 P. & D. 360; 41 L.

(*p*) 3 S. & T. 467; 33 L. J., P. & M. 185; 10 Jur., N. S. 593.

(*q*) L. R., 2 P. & D. at p. 361.

(*r*) *Ibid*.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 73, grants
under.

on the business of the deceased, which constituted nearly the whole estate (*s*).

The section is wholly inapplicable where there is no absence of persons entitled to administration, and no insolvency (*t*); neither will the Court ever pass over a next of kin to make a grant to a creditor under this section when the insolvency of the estate is disputed (*u*).

And the consent of the persons interested is not a sufficient ground for departing from the general rule as to grants (*v*).

Consent of
persons in-
terested not
sufficient
ground for
departing
from rules.

There must be special circumstances to justify the Court in departing from its ordinary practice and making a grant under this section (*x*); and a general allegation in an affidavit that "it is necessary for the preservation of the personal estate and effects of the deceased that administration should be granted," will not induce the Court to make such a grant; at any rate in the absence of the person properly entitled to the administration (*y*).

The Court will not pass over an executor by reason of his bad character only, he must also be resident out of the United Kingdom (*z*).

Examples.

In the following cases, the Court made grants of administration under sect. 73 by reason of special circumstances:—

(1.) To a creditor: *In the goods of Fraser* (*a*); *In the goods of Farrands* (*b*); *In the goods of Wensley* (*c*).

(*s*) *In the goods of Clayton*, 11 P. D. 76; 55 L. J., P. D. & A. 26; 34 W. R. 444; 50 J. P. 263.

(*t*) *Haynes v. Matthews*, 1 S. & T. 460.

(*u*) *Hawke v. Wedderburne*, L. R., 1 P. & D. 594; 37 L. J., P. & M. 33; 18 L. T. 336; 16 W. R. 712.

(*v*) *In the goods of Richardson*, L. R., 2 P. & D. 244; 40 L. J., P. D. & A. 36; 25 L. T. 384; 19 W. R. 979.

(*x*) *In the goods of White*, 2 S. & T. 457; 31 L. J., P. & M. 161; 6

L. T. 162; 10 W. R. 430.

(*y*) *In the goods of Cooke*, 1 S. & T. 267; 28 L. J., P. & M. 43; see also *In the goods of Bateman*, L. R., 2 P. & D. 242; 40 L. J., P. & M. 24; 24 L. T. 399; 19 W. R. 759.

(*z*) *In the goods of Samson*, L. R., 3 P. & D. 48; 42 L. J., P. & M. 59; 28 L. T. 478; 21 W. R. 468.

(*a*) L. R., 1 P. & D. 327; 36 L. J., P. & M. 63; 16 L. T. 154.

(*b*) 1 P. D. 439; 24 W. R. 1018.

(*c*) 7 P. D. 13; 51 L. J., P. D. & A. 21; 30 W. R. 431; 46 J. P. 264.

- (2.) To trustee of marriage settlement of sole next of kin: *In the goods of Maychell (otherwise Machell) (d)*; of deceased: *In the goods of Tyndall (e)*. C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 73, grants under.
- (3.) To the trustee in bankruptcy of the sole next of kin: *In the goods of Turner (f)*.
- (4.) To nominee of a married woman where the husband objected to her taking administration: *Clerke v. Clerke (g)*.
- (5.) To guardians of minors: *In the goods of Hagger (h)*; *In the goods of Burgess (i)*; *In the goods of See (j)*.
- (6.) To a sister of the intestate until the next of kin should apply for the grant: *In the goods of Cholwill (k)*.
- (7.) To a sister where the mother was willing to renounce: *In the goods of Llanwarne (l)*.
- (8.) To a sister without taking out administration to father of deceased who had also died intestate: *In the goods of Peck (m)*.
- (9.) To a sister when the mother was of great age: *In the goods of Clarke (n)*.
- (10.) To father in law, where sole next of kin resident in Australia: *In the goods of Jones (o)*.
- (11.) To mother without requiring her to take out

(d) 4 P. D. 74; 47 L. J., P. D. & A. 31; 39 L. T. 94; 26 W. R. 439.

(e) 51 L. J., P. D. & A. 12; 30 W. R. 231; 46 J. P. 169

(f) 12 P. D. 18; 56 L. J., P. D. & A. 41; 57 L. T. 372; 35 W. R. 384. See also *Tilley v. Trussler*, 26 W. R. 760.

(g) 6 P. D. 103; 50 L. J., P. D. & A. 69, 78; 29 W. R. 823; 45 J. P. 588.

(h) 3 S. & T. 65; 32 L. J., P. & M. 96; 8 L. T. 470; 9 Jur., N. S. 386; 11 W. R. 540.

(i) 4 S. & T. 188; 32 L. J., P. & M. 158; 9 L. T. 86; 9 Jur., N. S. 553; 11 W. R. 687.

(j) 4 P. D. 86; 48 L. J., P. D. & A. 70; 40 L. T. 658; 27 W. R. 665.

(k) L. R., 1 P. & D. 192; 35 L. J., P. & M. 75; 14 L. T. 338.

(l) L. R., 1 P. & D. 306; 36 L. J., P. & M. 25; 15 L. T. 193.

(m) 2 S. & T. 506.

(n) 46 L. J., P. D. & A. 16; 25 W. R. 82.

(o) 1 S. & T. 13; 27 L. J., P. & M. 17.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 73, grants
under.

administration to father who had not been heard of for many years: *In the goods of Smith (o)*.

- (12.) To step-mother for use and benefit of lunatic who was without a committee: *In the goods of Burrell (p)*.
- (13.) To cousin limited to carrying out certain directions contained in a letter from the next of kin: *In the goods of Drinkwater (q)*.
- (14.) To a cousin for use and benefit of aged aunt and uncle, the only persons entitled: *In the goods of Roberts (r)*.
- (15.) To guardians of poor for use and benefit of pauper lunatic: *In the goods of Findlay (s)*; *In the goods of Eccles (t)*; *In the goods of Richards (u)*.
- (16.) To attorney of next of kin abroad whose return was uncertain: *In the goods of Escot (x)*.
- (17.) To a stranger where no next of kin willing to take grant: *In the goods of Bateman (y)*.
- (18.) To next of kin and person entitled in distribution jointly, a joint grant being specially desirable: *In the goods of Grundy (z)*.
- (19.) To a stranger, there being doubt as to legitimacy of next of kin: *In the goods of Hopkins (a)*.
- (20.) To one of next of kin in England of one moiety of estate of deceased intestate who had died in India, such moiety having been sent over here by

(o) 2 S. & T. 508; 31 L. J., P. & M. 182; 7 L. T. 193; 10 W. R. 586. See also *In the goods of Astell*, 31 L. J., P. & M. 38.

(p) 1 S. & T. 64.

(q) 2 S. & T. 611; 31 L. J., P. & M. 93; 7 L. T. 251.

(r) 1 S. & T. 64.

(s) 3 S. & T. 265; 33 L. J., P. & M. 21; and *nom. Southwell v. Findlay*, 9 L. T. 346; 9 Jur., N. S. 1253; 12 W. R. 59.

(t) 15 P. D. 1; 59 L. J., P. D. & A. 5; 61 L. T. 652; 54 J. P. 55.

(u) 53 J. P. 807.

(x) 4 S. & T. 186; 28 L. J., P. & M. 17.

(y) L. R., 2 P. & D. 242; 40 L. J., P. & M. 24; 24 L. T. 399; 19 W. R. 759.

(z) L. R., 1 P. & D. 459; 37 L. J., P. & M. 21; 17 L. T. 451; 16 W. R. 406.

(a) L. R., 3 P. & D. 235; 44 L. J., P. & M. 42; 33 L. T. 320.

the administrator-general for distribution, the other moiety having been paid to the wife in India: *In the goods of Hughes (b).* C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 73, grants under.

(21.) To a person applying pursuant to an agreement to divide the estate where there were doubts as to the legitimacy of the person claiming as next of kin: *In the goods of Minshull (c).*

(22.) To nominee of guardians, of estate under value of 500*l.* of widow, a pauper lunatic (*d*). See also *post*, Chapter XVII., "LIMITED GRANTS."

It may, however, be observed, that the degrees of relationship are, for the purpose of distribution, computed in the same manner as for the purpose of the grant of administration (*e*). Persons entitled in distribution.

The following table shows the order in which distribution should take place, and the amounts to which each degree is entitled:—

<i>If the Intestate die, leaving—</i>	<i>His representatives take in the proportion following—</i>
Wife and child, or children	One-third to wife, rest to child or children; and if children are dead, then to the representatives (that is, their lineal descendants), except such child or children, not heirs-at-law, who had estate by settlement of intestate, or were advanced by him in his lifetime, equal to other shares.
Wife only, no blood relations	Half to wife, other half to the Crown.
Wife, no near relations	Half to wife, rest to next-of-kin in equal degree to intestate, or their legal representatives.
No wife or child	All to next of kin and their legal representatives.
No wife, but child, children, or representatives of them, whether such child or children by one or more wives	All to him, her, or them.
Children by two wives	Equally to all.
If no child, children, or representatives of them	All to next-of-kin in equal degree to intestate.
Child, and grandchild by deceased child	Half to child, half to grandchild, who takes by representation.
Husband	Whole to him.
Father, and brother or sister	Whole to father.
Mother, and brother or sister	Whole to them equally.
Wife, mother, brothers, sisters, and nieces	Half to wife, residue to mother, brothers, sisters, and nieces.
Wife, and father	Half to wife, and half to father.
Wife, mother, nephews, and nieces	Half to wife, one-fourth to mother, and other fourth to nephews and nieces.
Wife, brothers or sisters, and mother	Half to wife, half to brothers or sisters and mother.
Mother, but no wife, child, father, brother, sister, nephew, or niece	The whole to mother.
Wife, and mother	Half to wife, half to mother.
Brother or sister of whole blood, and brother or sister of half blood	Equally to both.

(*b*) L. R., 3 P. & D. 140; 43 L. J., P. & M. 31; 29 L. T. 377.

(*d*) *In the goods of Everley*, (1892)

(*c*) 14 P. D. 151; 58 L. J., P. D. & A. 69; 61 L. T. 257; 38 W. R.

P. 50; 61 L. J., P. D. & A.

(*e*) *Ante*, p. 179.

If the Intestate die, leaving—

Posthumous brother or sister, and mother
 Posthumous brother or sister, and brother or
 sister born in lifetime of father
 Father's father, and mother's mother
 Uncle's or aunt's children, and brother's or
 sister's grandchildren
 Grandmother, uncle, or aunt
 Two aunts, nephew, and niece
 Uncle, and deceased uncle's child
 Uncle by mother's side, and deceased uncle or
 aunt's child
 Nephew by brother, and nephew by half-sister.
 Nephew by deceased brother, and nephews and
 nieces by deceased sister
 Brother and grandfather
 Brother's grandson, and brother or sister's
 daughter
 Brother, and two aunts
 Brother, and wife
 Mother, and brother
 Wife, mother, and children of a deceased brother
 (or sister)
 Wife, brother, or sister, and children of a de-
 ceased brother or sister
 Brother or sister, and children of a deceased
 brother or sister
 Grandfather, no nearer relation

His representatives take in the proportion following—

Equally to both.
 Equally to both.
 Equally to both.
 Equally to all.
 All to grandmother.
 Equally to all.
 All to uncle.
 All to uncle.
 Equally *per capita*.^{*}
 Each in equal shares *per capita*, and not *per stirpes*.
 Whole to brother.
 All to daughter.
 All to brother.
 Half to brother, half to wife.
 Equally.
 Half to wife, a fourth to mother, and a fourth *per*
stirpes to deceased brother's or sister's children.
 Half to wife, one-fourth to brother or sister *per capita*,
 one-fourth to deceased brother's or sister's children
per stirpes.
 Half to brother or sister *per capita*, half to children
 of deceased brother or sister *per stirpes*.
 All to grandfather.

* That is, taking individually and not by representation. Thus, if A. die, leaving three brothers or sisters, they each take an equal part of his effects in his or her own right. But if either of them die, leaving children, his children would take his share *per stirpes*, that is *through him*, and not in their own rights.

19 & 20 Vict.
c. 94.

By the Act 19 & 20 Vict. c. 94, all special *local* customs relating to intestates' estates are abolished.

Intestates'
Estates Act,
1890.

By the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), it is enacted as follows:—

Intestate's
estate not ex-
ceeding 500l.
to belong to
widow where
no issue.

Sect. 1. "The real and personal estates of every man who shall die intestate after the first day of September one thousand eight hundred and ninety leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively."

Intestate's
estate exceed-
ing 500l.,
widow to
have a charge
for 500l.

Sect. 2. "Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of five hundred pounds the widow of such intestate shall be entitled to five hundred pounds part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such five hundred pounds, with interest thereon from the date of the death of the intestate at four per cent. *per annum* until payment."

Sect. 3. "As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively."

How charge to be borne as between realty and personalty.

Sect. 4. "The provision for the widow intended to be made by this Act shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of five hundred pounds, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed."

Above provision to be in addition to share of residue.

Sect. 5. "The net value of such real estates as aforesaid shall for the purposes of this Act be estimated in the case of a fee simple upon the basis of twenty years purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the Schedule annexed to the Statute sixteenth and seventeenth Victoria, chapter fifty-one, and in the case of an estate for a life or lives according to the said tables and rules."

How realty to be valued.

[Succession Duties Act, 1853.]

Sect. 6. "The net value of such personal estate as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject."

How personalty to be valued.

Sect. 7. "This Act may be cited as the Intestates' Estates Act, 1890."

Short title.

Sect. 8. "This Act shall not extend to Scotland" (f). Extent of Act.

(f) In *In the goods of Everley* Act, but preferred to make it under (see *ante*, p. 231), the Court was sect. 73. See L. J., W. N. Cas. asked to make a grant under this 1891, p. 180.

CHAPTER XVII.

OF ADMINISTRATION DE BONIS NON.

Grant *de bonis non administratis*.

It frequently happens, that after an executor has taken out probate, or an administrator a grant of letters of administration, with or without the will annexed, and before such executor or administrator has fully carried out the provisions of the will, or distributed the assets, as the case may be, his office is determined by his death, inability, or the like. It then becomes necessary to provide for the complete carrying out of the object for which the original grant was made. The Court in such a case, unless the executor has transmitted his appointment in one or other of the ways already specified (*a*), appoints a new representative, who obtains from the Court what is called a "*grant de bonis non administratis*," or, shortly, "*de bonis non*," or "*de bonis*" (*b*).

Chain of representation.

With regard to grants *de bonis*, it must be remembered that the estate of a number of executors in the effects of a deceased is a joint estate, each being possessed of the whole, and the estate surviving from one to the other, with all the attributes peculiar to joint estates. When, therefore, there is only one person left as representative of a deceased, whether originally so named, or as the last survivor of a number, then, and not till then, does his estate become transmissible.

(*a*) *Ante*, Chap. X.

(*b*) See on this subject generally,

Wms. on Exors., 9th ed. pp. 408—415.

Before the passing of the Court of Probate Act, 1857 C. P. Act, 1857 (20 & 21 Vict. c. 77), “if there were several executors, and the rest renounced and one alone proved the will, upon the death of him who had proved, no interest was transmissible to his executor; but the representation survived to the co-executors who might retract their former renunciation and assume the executorship” (c).

By sect. 79, however, of that statute it is enacted that, “where any person after the commencement of this Act renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.” Rights of an executor renouncing probate to cease as if he had not been named in the will.

And by sect. 16 of the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), it is further enacted that, “when- An executor not acting or not appearing to a citation to be treated as if he had renounced. ever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor” (d).

Where a grant of *administration with the will annexed* is made, in the case where the executor has died without having taken probate, or has renounced, or has been cited to take probate and has not appeared to such citation, this is not a grant *de bonis*, but an original grant. And this is so, “although the executor may have administered in part by disposing of the testator’s effects, &c. . . . because, although the acts done by the executor are good, the Where executor dies without having taken probate or renounces, it is an original, not a *de bonis* grant.

(c) Wms. on Exors., 9th ed. p. 409.

(d) *Ibid.*

Chain of
executorship.

administering is an act, *in pais*, of which the Court of Probate cannot take notice" (*f*).

It has already been shown in a former portion of this work under what circumstances the chain of executorship is transmitted from executor to executor (*g*). And, as is there shown, so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding executor.

Distinction
between
offices of
executor and
administrator.

An administrator, however, whether with or without a will annexed, stands, in this respect, in an entirely different position. For whereas an executor is a person selected to take charge of his estate and to manage his affairs by the testator himself, an administrator, on the other hand, "is merely an officer of the Court, prescribed to it by Act of Parliament, in whom the deceased has reposed no trust; and therefore, on the death of the administrator, no authority can be transmitted by him to his executor or administrator, but it results to the Court to appoint another officer" (*h*).

Therefore, on the death of a sole administrator, *whether he died testate or intestate*, it becomes in every case necessary at once to appoint an administrator *de bonis non* in order to effect a representation to the estate of the original deceased.

Distinction
between sole
and joint ad-
ministration
with respect
to grants *de
bonis non*.

Where, however, a joint grant of administration has been made in the first instance the case is different, for it is an office so far analogous to that of executor that it survives. The survivor will therefore become the sole administrator, and as long as he continues to exercise his office, no grant *de bonis non* will be made (*i*).

If the original testator dies in any place out of England, and the executor proves his will there and afterwards dies, having appointed his own executor, and such executor

(*f*) Wms. on Exors. 9th ed.
p. 408.

(*g*) *Ante*, pp. 118, 119.

(*h*) Wms. on Exors., 9th ed.
p. 411.

(*i*) *Ibid.*

proves the latter will here, this will not make such executor the representative of the original testator, but administration *de bonis non* must be obtained in England (*k*).

Testator dying out of jurisdiction.

In the case of *In the goods of Vea Murguia* (*l*) the original testatrix died in Spain, where she was domiciled, leaving a will made according to Spanish law, which was duly proved in the proper Court of that country. Subsequently a grant with the Spanish will annexed was made here to the attorney in this country of the executor appointed by the will. Subsequently such executor died, leaving part of the estate unadministered.

Grant to attorney of executor does not break chain of representation.

The Court, on the authority of *In the goods of Bayard* (*m*), held, that a grant to the attorney of an executor does not break the chain of representation, and therefore the executor's representative in this country was entitled to deal with such property of the testatrix as had been left unadministered by the testatrix, and that no further grant *de bonis non* was necessary.

Where the estate of a testatrix had been administered except as to one legacy, and the executor had died without leaving any legal personal representative, the Court granted administration with the will annexed to the legatee, without requiring the representatives of the executor or residuary legatees, but ordered the sureties to justify (*n*).

Estate administered except as to one legacy.

In this case it was urged upon the Court that the expense of finding the parties to be cited would be very great, and that the property to be distributed was very small, viz., under 200*l*. But Lord Hannen observed: "*The value of the property is immaterial, but as the will has been proved, and the estate to be distributed is ascertained, I think it will be safe to grant the motion, but I must require justifying security*" (*o*).

Value of estate left to be distributed immaterial.

(*k*) *In the goods of Gaynor*, L. R., 711.

1 P. & D. 723; 38 L. J., P. & M. 79; see also *Twyford v. Trail*, 7 Sim. 92.

(*l*) 9 P. D. 236; 53 L. J., P. D. & A. 47; 32 W. R. 799; 48 J. P.

(*m*) 1 Rob. 768.

(*n*) *In the goods of King*, 8 P. D. 162; 52 L. J., P. D. & A. 93; 31 W. R. 843.

(*o*) 8 P. D. at p. 163.

Executor dying intestate leaving portion of estate unadministered.

An executor died intestate leaving a portion of the estate unadministered. A suit for the administration of the estate of the testator had been instituted in the Chancery Division, and a personal representative was required. It was shown that, according to the certificate of the chief clerk, the residuary legatee had no beneficial interest, as there was no residue, and also that such residuary legatee, who was resident abroad, had had notice of the application by letter. The Court made a grant *de bonis non* to a specific legatee, subject to the filing of an affidavit verifying the Chief Clerk's certificate, that after payment of the debts and legacies there would be no residue remaining (*p*).

Grant *de bonis non* to specific legatee.

Executors dying intestate; general rule as to administration *de bonis non*.

If from any of the above causes the chain of representation be broken, *administration de bonis non with the will annexed* will be granted, according to the principles already laid down (*q*), to the person or persons, or their representatives, who would have been entitled to it had no executor been appointed, or had the executor when appointed renounced, died without taking probate, or been cited to take probate and failed to appear to such citation.

Husband administrator.

It has been already seen (*r*) that the right of a husband to the grant of administration to the goods of his wife survives to his duly-constituted personal representative, even though the husband may have died without taking the grant. But "where a woman obtained a grant of the estate of a deceased intestate as a creditor, and then married and died, the Court held that the husband was not entitled to a grant *de bonis* to the estate of such deceased intestate as a creditor, but only as the representative of his wife" (*s*).

Who entitled

It remains to be considered who, on the death either of

(*p*) *In the goods of Wilde*, 13 P. 182.

D. 1; 57 L. J., P. D. & A. 7; 57

L. T. 815; 36 W. R. 400; 51 J. P. 775.

(*q*) *Ante*, Chap. XIV., pp. 169—

(*r*) *Ante*, p. 205.

(*s*) *In the goods of Risdon*, L. R., 1 P. & D. 637; 38 L. J., P. & M. 46; 20 L. T. 330; 17 W. R. 576.

an administrator with the will annexed or of an ordinary administrator, will be entitled to the grant of administration *de bonis non*. on death of administrator.

In making such grants, the Court will be guided by the same rules that would guide it with respect to original grants. In the former case, therefore, the grant would, unless by consent of all parties, or for good cause shown to the contrary, be made as a general rule to the party surviving who takes the greatest interest under the will. With the will annexed.
 As, for example, if an original grant were made to the residuary legatee, on his death, leaving a portion of the property unadministered, the Court would, except under special circumstances, make a grant *de bonis non* with the will annexed to one or other of the principal legatees. To party taking greatest interest under will.

It may, however, be taken as a safe general rule with respect to this, and indeed every other application made in the Probate Division, that the Court will not act unless all the parties having any claim to the grant are either represented before it, or consent to the application, or have renounced their claim, or have been cited to appear, or in some other way have had due notice of the proceeding. And although the Court both can and will—if it thinks just—dispense with the presence, consent, renunciation, or citation, of such parties, it will not do so unless satisfied that there are some special circumstances existing which render such dispensation desirable in the interests of justice. General rule as to representation or consent of parties interested.

It has been held, however, that a limited administration *de bonis non* with will annexed will not be generally granted to a legatee. The parties entitled to a general grant must first be cited, and if they refuse to take administration, then the legatee will be entitled to a general grant (*l*). Limited administration *de bonis non*.

Where an ordinary administrator dies leaving a portion of the estate unadministered (*u*), it is the established practice of the Court to consider who were the next of kin at Administrator dying leaving portion of estate unadministered.

(*l*) *In the goods of Watts*, 1 S. & T. 538; 29 L. J., P. & M. 108; 8 W. R. 340.

(*u*) See on this subject, Wms. on Exors., 9th ed. pp. 412, 413.

Next of kin
at time of
death only
considered.

the time of the death of the intestate, and not who may happen to be the next of kin at the time of the grant *de bonis non* (x).

For it has been held that the statutes relating to the appointment of administrators have no application to any except such as were next of kin at the time of the death of the intestate. Therefore, if all such be dead when the grant *de bonis non* is required, it is the practice of the Court to make the grant according to its own rules, and the general rule is to make the grant "to him who has the largest interest in the effects of the original intestate" (y).

Party origi-
nally entitled
in distribution
preferred to
party having
derivative
interest.

And in such a case the general practice of the registry in making such a grant is to prefer a party originally entitled in distribution to a party having a derivative interest, *e. g.*, the personal representative of the next of kin, but there is nothing to prevent the Court, on sufficient grounds shown, from departing from this practice (z).

*In the goods
of Carr,*
per Lord Pen-
zance.

The following observations of Lord Penzance in *In the goods of Carr* (a) seem to put the practice of the Court in making these grants in a very clear and simple light.

"There are three propositions established. The first is, that the Court is not bound by the statute to make the grant to the party entitled in distribution. The second is, that the general practice that prevails would enable the party entitled in distribution to obtain the grant on application at the registry, the right of a party originally entitled being preferred to that of a party having a derivative interest. The third proposition is, that the whole of the matter is in the discretion of the Court."

(x) Wms. on Exors., 9th ed. p. 411.

(y) *Ibid.* p. 412.

(z) *In the goods of Carr*, L. R., 1 P. & D. 291; 16 L. T. 181; 15 W. R. 718. See also *In the goods*

of Middleton, 2 Hagg. 60; *Budd v. Silver*, 2 Phill. 115; *Savage v. Blythe*, 2 Hagg. App. 150; *Almes v. Almes*, *ib.* 155.

(a) L. R., 1 P. & D. at p. 292.

An assignee in bankruptcy of an administrator who is out of the jurisdiction is a creditor within the meaning of 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, and as such may obtain administration *de bonis non* of the intestate limited to the fund to which the assignee is entitled (*b*).

Assignee in bankruptcy of administrator.

Where an intestate had died leaving no known relatives, and his estate had been partly administered by his widow, who died leaving a will, the Court made a grant of administration *de bonis non* to the nominee of the Duchy of Lancaster who was the residuary legatee of the widow (*c*).

To nominee of Duchy of Lancaster.

It need scarcely be observed that the 73rd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), applies as much to grants *de bonis non* as to original grants (*d*).

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 73.

So a joint grant of administration *de bonis non* was made under this section to a next of kin and a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient (*e*).

Joint grant under.

Where, in 1880, a grant *de bonis non* had been made to one of the grandchildren and residuary legatees by a testator, and, in 1884, the administrator *de bonis non* disappeared leaving a letter to the effect that his body would be found at the bottom of the river, and it appeared that he had already previously attempted to commit suicide, the Court revoked the grant *de bonis non* so made to him, and made a similar grant in favour of another of the grandchildren and residuary legatees of the original testator (*f*).

Administrator *de bonis non* committing suicide.

(*b*) *In the goods of Hammond*, 6 P. D. 104; 50 L. J., P. D. & A. 70, 73; 44 L. T. 649; 29 W. R. 807; 45 J. P. 619.

(*c*) *In the goods of Avar*, 11 P. D. 75; 56 L. T. 673.

(*d*) *Ante*, p. 179.

(*e*) *In the goods of Grundy*, L. R., 1 P. & D. 459; 37 L. J., P. D. & A. 21; 17 L. T. 451; 16 W. R. 406.

(*f*) *In the goods of Covell*, 15 P. D. 8; 59 L. J., P. D. & A. 7; 61 L. T. 620; 38 W. R. 79.

CHAPTER XVIII.

OF LIMITED GRANTS.

Limited grants, what are.

BESIDES the general grants with which we have already dealt, the Probate Division also makes what are called limited grants. These latter grants only represent the deceased to a certain extent, and the residue of the representation has to be included in a grant of the rest of his property (*ceterorum*). Sometimes a grant really limited is made in the form of a general or undefined grant, in which case it is made as a grant of the representation of the deceased, *save and except* some distinct portion; the representation of the deceased in either case passing away, as it were, in different directions.

Ceterorum.

Save and except.

Probate Rules (Non-Contentious Business), r. 29.

By Rule 29 of the Probate Rules (Non-Contentious Business, 1862), limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge (*a*).

Ibid., r. 30.

And by Rule 30, no person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the judge. This practice, however, is not inflexible, and the Court may depart from it, although a district registrar may not (*b*).

(*a*) See *In the goods of Barker*, 1 Curt. 592; *In the goods of Keene*, 28 L. J., P. & M. 35; *Pegg v. Chamberlain*, 1 S. & T. 527; 8 W. R. 273. This rule is subject

to variation at the discretion of the Court.

(*b*) *Patteson v. Hunter*, 30 L. J., P. & M. 272.

It is a rule that general letters of administration cannot be granted to a person having an interest only in part of the effects of the deceased, but the grant must be limited to that part (c).

General grant cannot be made to party interested in part of estate only.

The first example of this species of administration with which it is proposed to deal is what is called the grant *durante minore ætate* (d).

Of administration *durante minore ætate*.

“If the person appointed sole executor, or he to whom, in case of intestacy, the right of administration has devolved under the statutes, be within age, a peculiar sort of administration must be granted, which is called an administration *durante minore ætate*” (e).

Definition of.

This sort of administration has been frequently held not to be within the statute of 21 Hen. 8, c. 5, and it was therefore discretionary with the Spiritual Court to grant it to whoever it thought fit. The person to whom it was usually granted was the guardian whom the Spiritual Court had a right by law to appoint for a personal estate (f).

Not within 21 Hen. 8, c. 5.

And by sect. 6 of 38 Geo. 3, c. 87, it is enacted that, “whereas inconveniences arise from granting probate to infants under the age of twenty-one; be it enacted, that where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him” (g).

38 Geo. 3, c. 87, s. 6.

Where an infant is sole executor, administration to be granted to the guardian, &c.

“With respect to the appointment of guardian a distinction exists between an infant and a minor. The former is so denominated if under seven years of age; the latter

Distinction between “infant” and “minor.”

(c) *In the goods of Dodgson*, 1 S. 135; *Hughes v. Richards*, 2 *Ibid.* 543.
& T. 260; 28 L. J., P. & M. 116;
5 Jur., N. S. 252.

(d) See on this subject, Wms. on Exors., 9th ed. p. 416.
(e) Wms. on Exors., 9th ed. p. 416.
(f) *Ibid.* p. 417.
(g) See *ante*, p. 107.

Of adminis-
tration *durante*
minore
etate.

from seven to twenty-one. The Court *ex officio* assigns a guardian to an infant; the minor himself may nominate his guardian, who is then admitted in that character by the judge; but if the minor makes an improper choice the Court will control it. According to the practice of the Prerogative Court, the guardianship was granted to the next of kin of the child, unless sufficient objection to him was shown" (g).

Guardianship
of infants.

A father has the first right to the guardianship of his infant children, and next to him persons appointed by him by deed or will, but such persons may be disregarded by the Court for special reasons (h).

12 Car. 2,
c. 24, s. 8.

The 8th section of 12 Car. 2, c. 24, which enables a father to dispose of the custody and tuition of his minor child by will, sanctions his giving authority to a surviving guardian to nominate a person in the place of one who has died (i).

Minor sole
next of kin
and residuary
legatee.

When a minor is sole next of kin and residuary legatee, she may select a guardian for all purposes in law, and especially for taking *administration with the will annexed* (j).

Father passed
over.

The Court may in its discretion pass over the next of kin at any time. So where a wife has died intestate leaving minor children, after having been divorced on the ground of her husband's adultery and desertion (k), or after having obtained a protection order (l), the Court has passed over the father without even citing him, and made the grant in favour of a guardian elected by the minor.

(g) Wms. on Exors., 9th ed. pp. 417, 418; for the rules regulating the appointment of guardians in the registry, see *post*, p. 298.

(h) *Fawkener v. Jordan*, 2 Cas. temp. Lee, 327.

(i) *In the goods of Parnell*, L. R., 2 P. & D. 379; 41 L. J., P. & M. 35; 26 L. T. 744; 20 W. R. 494.

(j) *Fawkener v. Jordan*, 2 Cas. temp. Lee, 327.

(k) *In the goods of Hay*, L. R., 1 P. & D. 51; 35 L. J., P. & M. 3; 13 L. T. 335; 11 Jur., N. S. 936; 14 W. R. 147.

(l) *In the goods of Stephenson*, L. R., 1 P. & D. 287; 36 L. J., P. & M. 20; 15 L. T. 296; 15 W. R. 286. See also *In the goods of Ewing*, 1 Hagg. 381; *In the goods of Weir*, 2 S. & T. 451; 28 L. J., P. & M. 111; 8 Jur., N. S. 393.

But where a husband and wife separated by agreement, and the husband covenanted not to claim administration of his wife's estate if she should die during his lifetime, and the wife did die during his lifetime, intestate and leaving minor children, the Court refused to grant administration to the guardian elected by such minor children, without first citing the husband (*m*). *Secus* when husband and wife separated by mutual agreement.

A testamentary guardian has a right to administration for the use and benefit of minors in preference to the guardian elected by them. So where a wife died, having survived her husband, intestate, and leaving minor children, administration of her estate for the use and benefit of such children was granted to the guardian appointed by the will of the husband in preference to the guardian elected by them (*n*); and the Court also made a grant to a stranger in blood as testamentary guardian of certain minors, without notice to the next of kin, on proof that one had renounced, and that the remainder were at a distance, or that their address 'could not be ascertained' (*o*). Testamentary guardian preferred to guardian elected by minors.

Where a father died intestate leaving four children, of whom one was of full age, but abroad, and the other three minors, and an immediate grant was necessary for the benefit of the estate, the Court granted administration to the duly elected guardian of the minors, limited until the eldest son should apply for a grant (*p*). Eldest son abroad.

By the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 1, 2, it is enacted that on the death of the father the mother shall be the guardian of the children, either alone or jointly with the guardian appointed by the father, or by the Court of Chancery; and that the mother Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 1, 2.

(*m*) *In the goods of Pigott*, 42 L. J., P. & M. 77; 29 L. T. 45; 21 W. R. 823.

(*o*) *In the goods of Webb*, 13 P. D. 71; 57 L. J., P. D. & A. 36; 58 L. T. 683; 36 W. R. 847; 52 J. P. 231.

(*n*) *In the goods of Morris*, 2 S. & T. 360; 31 L. J., P. & M. 80; 5 L. T. 768.

(*p*) *In the goods of Burgess*, 4 S. & T. 188.

Guardianship
of Infants
Act, 1886 (49
& 50 Vict.
c. 27), ss. 1, 2.

may appoint by deed or will a guardian after the death of herself and the father, and when guardians are appointed by both they shall act jointly.

In the first of these cases a grant is made to her as the natural and lawful mother and the lawful guardian without any election.

Nearest relatives of minor children abroad.

The nearest relatives of minor children having been abroad for many years without having communicated with their friends in this country, the Court permitted the children to elect another person to take administration on their behalf of the estate of their father, without citing such nearest relatives in the first instance (*q*).

And where the next of kin of a minor who was universal legatee under a will were an uncle who was abroad, an aunt who was in poor circumstances, and another aunt who had renounced, the Court made the grant to a guardian elected by the minor (*r*).

Joint grant to widow as guardian of her own children, and guardian of children of deceased by former marriage.

Dr. Tristram mentions an unreported case where a joint grant was made by the Court on motion to the widow as guardian of two of the deceased's children by her, jointly with the guardian of the other children of the deceased, not by her, the widow being allowed to renounce her right to administration as widow (*s*).

Creditor appointed guardian to minors.

Where an intestate died insolvent, leaving three children minors, who had no known relations, and were the only persons entitled in distribution, the Court appointed a creditor guardian to the children, for the purpose of taking out administration (*t*).

Minor wife.

Where a wife is a minor, and entitled to administration as sole next of kin, she may elect her husband as guardian

(*q*) *In the goods of Burchmore*,
L. R., 3 P. & D. 139; 43 L. J.,
P. & M. 1; 29 L. T. 377; 22
W. R. 70.

32 W. R. 756; 48 J. P. 456.

(*r*) *In the goods of Gardiner*, 9
P. D. 66; 53 L. J., P. D. & A. 31;

(*s*) *Dalton*, deceased, November,
1871, cited Tristram on Probate,
11th ed. p. 212.

(*t*) *In the goods of Peck*, 1 S. & T.
141; 27 L. J., P. & M. 106.

to take administration for her use and benefit until she attain her majority (*u*).

Where the persons entitled in distribution to the effects of an intestate were minors, and their next of kin were abroad, the Court, under the 73rd section of the 20 & 21 Vict. c. 77, granted administration for their use and benefit to a guardian elected by them, without requiring that the next of kin should be cited or renounce (*x*).

Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73. Grants to guardians of minors under sect. 73.

And the following further grants have more recently been made under the same section :—

- (1.) Upon proof that there was urgent need of immediate administration, to the paternal aunt of the minor, whom she had elected as her testamentary guardian, where such minor was sole legatee under her father's will, the sole surviving executor of which was abroad at the time of the testator's death, and the date of his return was uncertain, and the next of kin of the minor were dead or resident out of the jurisdiction of the Court: *In the goods of Batterbee (y)*.

To paternal aunt of minor sole legatee, executor abroad.

- (2.) To a guardian appointed by the Chancery Division, where a deceased intestate left children whose legitimacy was disputed in proceedings in that division of the High Court. Such grant to be limited until the persons entitled by law to letters of administration to the estate of the deceased should have obtained such administration: *In the goods of Mustapha (z)*.

To guardian appointed by Chancery Division.

The subject of administrations *pendente lite* will be considered hereafter (*a*).

Administration *pendente lite*.

“If the executor named in the will or the next of kin

(*u*) See Wms. on Exors., 9th ed. p. 418.

(*x*) *In the goods of Hagger*, 3 S. & T. 65; 32 L. J., P. & M. 96; 8 L. T. 470; 11 W. R. 540; 9 Jur., N. S. 386.

(*y*) 14 P. D. 39; 58 L. J., P. D. & A. 38; 60 L. T. 838; 37 W. R. 416; 53 J. P. 231.

(*z*) 59 L. J., P. D. & A. 61; 62 L. T. 606.

(*a*) *Post*, p. 435.

Of administration *durante absentia*.

Practice of Ecclesiastical Courts.

38 Geo. 3, c. 87, s. 1.

If after a certain period the executor to whom probate is granted shall not reside within the jurisdiction of his Majesty's Courts, on application of a creditor, &c., special administration may be granted, for which a 5s. stamp duty shall be paid.

Applied only to executors.

were out of the kingdom, the Ecclesiastical Courts always had power before probate obtained, or letters of administration issued, of granting to another a limited administration *durante absentia*” (e), but such absence was held to mean an absence out of the realm (d).

“But when probate was once granted and the executor had gone abroad, the Ecclesiastical Courts did not feel themselves authorized to grant new administration on the ground that the executor had left the kingdom. Nor could a court of equity interfere by appointing a receiver; . . . the consequence . . . was that there was no person existing within the jurisdiction of the courts of law and equity duly authorized to appear and collect the debts. To remedy this inconvenience, the statute 38 Geo. 3, c. 87 (usually called Mr. Simeon's Act), was passed” (e), by sect. 1 of which it is enacted “that, at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his Majesty's courts of law and equity, it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment stamped only with one five shilling stamp, and shall pay no further or other duty to his Majesty, his heirs or successors.”

This statute applied only to executors (f); therefore, by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77),

(e) Wms. on Exors., 9th ed. p. 433. See also on this subject generally, *Ibid.* pp. 433—439.

(d) *Ibid.* p. 434. See also *Clare v. Hedges*, 1 Lutw. 342; *Slater v. May*, 2 Ld. Raym. 1071; *Lucas v. Lucas*, 2 Cas. temp. Lee, App.

576.

(e) Wms. on Exors., 9th ed. pp. 434, 435.

(f) See *Ibid.* p. 435, n. (i). See also *Hay v. Willoughby*, 2 Rob 184; *In the goods of Harrison*, *Ibid.*

s. 74, it is enacted that "the provisions of an Act passed in the thirty-eighth year of his late Majesty King George the Third, chapter eighty-seven, shall apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her Majesty's courts of law and equity."

38 Geo. 3, c. 87, extended to administrators.

C.P. Act, 1857 (20 & 21 Vict. c. 77), s. 74.

The affidavit mentioned in sect. 1 of 38 Geo. 3, c. 87— a form of which was prescribed in sect. 2 of the statute— contained an averment that the deponent was desirous of exhibiting a bill in equity; and sect. 3 contained a form of grant limited to proceedings in equity. It was, therefore, held that the Act applied only to cases where there were proceedings in equity.

Affidavit to be sworn by applicant under 38 Geo. 3, c. 87.

This state of things continued until the passing of the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), by sect. 18 of which it is enacted that "the provisions of an Act passed in the thirty-eighth year of George the Third, chapter eighty-seven, and of 'the Court of Probate Act,' shall be extended to all executors and administrators residing out of the jurisdiction of her Majesty's courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to the passing of the last-mentioned Act, and it shall be lawful to alter the language of the grant prescribed by the first-named statute so as to make it apply to grants made in the Court of Probate under the said last-mentioned Act."

Provisions of 38 Geo. 3, c. 87, and 20 & 21 Vict. c. 77, extended to all cases of executors and administrators.

C. P. Act, 1858 (21 & 22 Vict. c. 95), s. 18.

An assignee in bankruptcy of an administrator who is out of the jurisdiction is a creditor within the meaning of 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, and as such may obtain administration *de bonis non* of the intestate, limited to the fund to which the assignee is entitled (g).

Assignee in bankruptcy of administrator out of jurisdiction.

(g) *In the goods of Hammond*, 6 70, 73; 44 L. T. 649; 29 W. R. P. D. 104; 50 L. J., P. D. & A. 807; 45 J. P. 619.

C. P. Act,
1857, s. 73,
distinguished.

It must also be observed that these enactments apply to cases where probate or administration has already been granted, and they must not be confounded with the Court of Probate Act, 1857, sect. 73 (*h*), which provides for the case where no probate or administration has as yet been granted.

Acts apply to
the case of the
executor of
an executor.

The above Acts have been held to apply to the case of the executor of an executor (*i*).

Grant to per-
sonal repre-
sentative of
legatee under
38 Geo. 3,
c. 87.

Though the *legatee* only is mentioned in the 38 Geo. 3, c. 87, yet the Court granted a limited administration to the personal representative of a legatee, the executor being out of the jurisdiction, holding that the case came within the spirit, if not within the letter, of the statute (*k*).

To new
trustee.

The executor and trustee under a will lent a portion of the trust fund on the security of a promissory note made payable to him as executor; he subsequently became bankrupt and went abroad, and a new trustee was appointed in his place by the Court of Chancery; administration, with the will annexed, was granted to the new trustee, limited to the interest of the *cestui que trust* in the money due on the promissory note (*l*).

38 Geo. 3,
c. 87, s. 1.
Meaning of
“at the ex-
piration of
twelve
months.”

The words “at the expiration of twelve months from the death of the testator,” in sect. 1 of 38 Geo. 3, c. 87, when compared with the words given in the form of affidavit in the second section, and of the grant of administration in the third, must be held to mean *at or after* the expiration of that period.

Applicant re-
siduary lega-
tee whose
interest unde-
termined.

Where the applicant is the residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside

(*h*) *Ante*, p. 179.

(*i*) *In the goods of Grant*, L. R., 1 P. D. 435; 45 L. J., P. & M. 88; 24 W. R. 929.

(*k*) *In the goods of Collier*, 2 S. & T. 444; 31 L. J., P. & M. 63; 5

L. T. 849. See also *In the goods of Cooper*, 1 S. & T. 66.

(*l*) *In the goods of Hampson*, L. R., 1 P. & D. 1; 35 L. J., P. & M. 1.

for and actually payable to the applicant, the grant can be made under 21 & 22 Vict. c. 95, s. 18 (*m*).

“When the Probate Court, in the exercise of its ordinary jurisdiction, grants administration during the absence of an executor or next of kin before probate or administration taken out by him, such administration is at an end the moment he returns” (*n*); but it is otherwise if the grant be made under 38 Geo. 3, c. 87 (*o*).

Distinction between ordinary and statutory jurisdiction of Probate Division in making grants *durante absentia*.

Grants *durante absentia* to attorneys of executors or parties entitled to administration are not revoked, but are pronounced to have ceased and expired on the application of the executor or party entitled for probate or administration, and the usual affidavit that no suits were pending. In a case heard in the year 1832, the Court declared that for the future such grants should be for the use and benefit of and until the executor (or party entitled to the administration) should apply for and obtain probate or administration (*p*). And the power of such an administrator entirely determines on the death of the executor whom he represents as his attorney (*q*).

Determination of grant.

Where upon the death of a testator, A. the surviving executor, being resident in Sydney, B. who held a power of attorney to act for A. in this country, sent out to him, for execution, a special power of attorney, to authorize B. to take out administration, with the will annexed, for A.'s use and benefit, and also a proxy of renunciation in case he should wish to renounce: the residuary legatee for life was incompetent from senility to take administration; and subject to her interest, B. and others were entitled to the residue: the majority of the persons interested under the

Power of administrator *durante absentia* determines on return of executor.

Grant to person holding power of attorney to act for executor in this country.

(*m*) *In the goods of Ruddy*, L. R., 2 P. & D. 330; 41 L. J., P. & M. 63; 25 L. T. 950; 20 W. R. 319.

(*n*) Wms. on Exors., 9th ed. p. 437. See also *Slater v. May*, 2 Ld. Raym. 1071.

(*o*) *Taynton v. Hannay*, 3 B. & P. 26; 7 Ves. 460.

(*p*) *In the goods of Cassidy*, 4 Hagg. 360.

(*q*) *Webb v. Kirby*, 3 Sm. & G. 33; 2 or 7 De G., M. & G. 376; 25 L. J., Eq. 273; see also on subject of these administrations, *Chambers v. Bicknell*, 3 Hare, 536.

will, being desirous that a grant should be made without waiting for the return of the power of attorney or renunciation, the Court granted administration, with the will annexed, to B., limited until such time as A. should apply for probate, or his attorney for administration, with the will annexed (*r*).

Representative wanted immediately.

And in another case where the only person entitled to the estate was resident in Australia, and a legal representative was wanted immediately for the preservation of the property, administration for the use and benefit of the person so entitled was made to his father-in-law (*s*).

Grant to attorney of Administrator-General of British Guiana.

A testator, domiciled in British Guiana, by his will appointed two executors, one resident in the colony, the other in England, with power of substitution in the event of either or both being unable or unwilling to act. The executor residing in the colony administered the estate, on his own behalf and on behalf of the other executor, until he returned to this country to reside here permanently. By the law of the colony an executor under such circumstances has the right to substitute as executor the Administrator-General of the colony, who thereupon becomes possessed of all the powers necessary for the due administration of the estate. This substitution had been effected by the executor before leaving the colony, and there being estate in this country which required a personal representative here, the Court made a grant of administration to persons nominated as attorneys of the Administrator-General, until such time as the Administrator-General or the executor resident in this country who had not renounced should apply, and without requiring justifying security (*t*).

Court cannot pass over executor by reason of bad

The Court cannot pass over an executor by reason of his bad character only; he must also be resident out of the

(*r*) *In the goods of Lewis*, 29 L. J., P. & M. 94.

(*t*) *In the goods of Black*, 13 P. D. 5; 57 L. J., P. D. & A. 20; 36

(*s*) *In the goods of Jones*, 1 S. & T. 13; 27 L. J., P. & M. 17.

W. R. 400.

United Kingdom at the time of the death of the testator. In that case it makes a grant to some other person, with such limitations as it may think fit (*u*). character only; must be out of country.

A minor was sole legatee under her father's will. Of two executors one predeceased the testator, and the other was, at the time of the testator's death, in Brazil, and his return was uncertain. The next of kin of the minor had either renounced or were out of the country. The Court, under 20 & 21 Vict. c. 77, s. 73, made a grant of administration with the will annexed to the paternal aunt of the minor, whom she had elected as her testamentary guardian (*x*). C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 73.

"If the executor be disabled from acting, as if he becomes lunatic, or incapable of legal acts, then, on the principle of necessity, there shall be a grant of temporary administration with the will annexed. Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the Court to make a limited grant to his committee for his use and benefit during his lunacy. By the consent, given or implied, of the committee of the lunatic, administration with the will annexed may be committed to a residuary legatee during the lunacy of the executor. Administration limited during lunacy of executor or administrator.

"It was also the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so had not been found so by inquisition" (*y*).

In *In the goods of Southmead* (*z*), Sir Herbert Jenner Fust said: "The grant of this administration is in the discretion of the Court, no party being of right entitled to

(*u*) *In the goods of Samson*, L. R., 3 P. & D. 48; 42 L. J., P. & M. 59; 28 L. T. 478; 21 W. R. 568.

(*x*) *In the goods of Batterbee*, 14 P. D. 39; 58 L. J., P. D. & A. 38; 60 L. T. 838; 37 W. R. 416; 53 J. P. 231.

(*y*) Wms. on Exors., 9th ed. p. 441; citing *Hills v. Mills*, 1 Salk. 36; Toller, 99; *In the goods of Phillips*, 2 Add. 336, n. (*b*); *In the goods of Milnes*, 3 Add. 55. See also on this subject generally Wms. on Exors., 9th ed. pp. 441—444.

(*z*) 3 Curt. 28.

Committee of lunatic preferred to next of kin.

No committee.

it." But in *Alford v. Alford* (a) the Court held that where a committee of a lunatic had been appointed he was to be preferred to the next of kin.

Where the lunatic has not been found so by inquisition the Court exercises its discretion, sometimes granting administration to a residuary legatee, or—if no residuary legatee—to the next of kin, or to a stranger, according to the circumstances of each case, as a rule requiring the next of kin to be cited, in the absence of consent.

The Court also requires proof of lunacy, and that the administrator shall give justifying security (b), though these rules may be dispensed with by the Court for sufficient cause shown (c).

Practice.

The practice of the Court on this point may be shortly stated as follows:—

Where the lawful widow and relict is a lunatic, upon evidence of the doctor and nurse attending her, a permanent grant is made to the next of kin of the deceased.

If such next of kin are not also the next of kin of the lunatic, a declaration of the estate of the deceased must be filed, and the sureties must justify.

When the next of kin are minors, the grant will be made for the use and benefit of the minors, and until one of them shall attain twenty-one years of age, or the widow become of sound mind.

"Until the year 1824, no case of an application to the Court to supply a defect in the legal representation of the party deceased, occasioned by the lunacy of one of several administrators, is believed to have occurred" (d).

(a) 3 Jur., N. S. 990. See also *In the goods of Scarlett*, 27 L. T. 215; 21 W. R. 79.

(b) See Wms. on Exors., 9th ed. p. 442; citing *Ex parte Evelyn*, 2 Mylne & K. 4; *Evans v. Tyler*, 2 Rob. 134; 7 N. of C. 305, 306; *In the goods of Joseph*, 1 Curt. 907; *In the goods of Penny*, 4 N. of C. 659; *In the goods of Binckes*, 1 Curt. 286; *In the goods of Crump*, 3

Phillim. 497; *In the goods of Hardstone*, 1 Hagg. 487.

(c) *In the goods of Southmead*, 3 Curt. 28; where administration *de bonis non* was granted to the executors of a sister, the administratrix deceased, for the benefit of the surviving sister during her imbecility, without citing her next of kin.

(d) Wms. on Exors., 9th ed. p. 443.

Where one of several administrators becomes lunatic.

In that year, in the case of *In the goods of Phillips* (e), where one of three joint administrators became lunatic, in consequence of which the interest of certain property of the deceased could not be received from the Bank of England, the Court directed that upon the letters of administration being brought back into the registry by the two sane administrators and the committees of the insane one, by consent of the latter, letters of administration should issue to the two sane administrators alone.

One of several joint administrators becoming lunatic.

Where one of the executors was insane and the other a seafaring man engaged on a voyage to the West Indies, administration with the will annexed was granted to a third person (f).

Examples of grants during lunacy.

Where an intestate left no known relation except a sister who was insane, but had not been found so by inquisition, the Court refused to grant administration for the use and benefit of the lunatic to a stranger in blood, until the Court of Chancery made an order under 25 & 26 Vict. c. 86, s. 12, rendering her property available for her maintenance and benefit (g).

Grant to stranger in blood.

Where an intestate died leaving her lawful sister and next of kin, a person of unsound mind, her surviving, and a committee of the estate of such lunatic had been appointed, and the Masters in Lunacy objected to such committee taking out administration to the deceased intestate, the Court made a grant for the use and benefit of the lunatic to a stranger in blood of the deceased (h).

The following grants have been made under sect. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), where the parties entitled to a grant of administration to the personal estate of a deceased person were insane:—

C.P. Act, 1857 (20 & 21 Vict. c. 77), s. 73. Grants during lunacy.

(e) 2 Add. 235.

11 Jur., N. S. 396; 12 L. T. 582;

(f) *In the goods of Lewis*, 25 L. T. 510; 19 W. R. 1038.

13 W. R. 696.

(g) *In the goods of Slumbers*, 4 S. & T. 32; 34 L. J., P. D. & A. 93;

(h) *In the goods of Hastings*, 1 P. D. 73; 47 L. J., P. D. & A. 30; 39 L. T. 45.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 73.
Grants during
lunacy.

widow of deceased was a lunatic, and the next of kin had been duly cited and had not appeared: *In the goods of Richards* (i).

- (2.) To nominee of guardians, where next of kin was a pauper lunatic and an inmate of the county asylum, *limited to such time as the pauper should remain insane: In the goods of Eccles* (k).

Cestui que trust.

The Court will grant letters of administration to a *cestui que trust* of a trust fund limited to that trust, when the trustee in whose name the fund stands is dead, and is without a personal representative, the parties entitled to represent the deceased trustee having first consented, renounced, or been cited. When there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trust* assent to the grants extending to their respective interests (l), but this now applies only to trusts created by deed.

Trust created
by will.

When the trust is created by will, the limited administration of the estate of the deceased trustee is granted to the representative of the testator, and if there is none alive, a grant "*de bonis non*" must first be taken out to him.

To specific
fund devised.

Where a will bequeathed certain specific property, but had no residuary clause, the legatee was held to be entitled to a grant of administration, with the will annexed, limited to the property specified in the will (n). With respect to this case, the judge seems afterwards (n) to have said that the party was miserably poor, and there were only two cases in which similar grants had been made.

(i) 53 J. P. 807.

(k) 15 P. D. 1; 59 L. J., P. D. & A. 5; 61 L. T. 652; 54 J. P. 55.

(l) *Pegg v. Chamberlain*, 1 S. & T. 527; 8 W. R. 273.

(n) *In the goods of Watson*, 1 S. & T. 110; 27 L. J., P. & M. 7.

(n) *In the goods of Watts*, 1 S. & T. 538; 29 L. J., P. & M. 108; 8 W. R. 340. See *In the goods of Somerset*, L. R., 1 P. & D. 350; *In the goods of Prothero*, L. R., 3 P. & D. 209; 44 L. J., P. & M. 8; 31 L. T. 551; 23 W. R. 212.

"It has already appeared (*o*) that an executor may be appointed with limitations as to the time when he may begin his office, as where a man is appointed to be executor at the expiration of five years from the death of the testator. Limited until there be an executor.

"So the testator may appoint the executor of A. to be his executor, and then, if he die before A., he has no executor till A. die.

"In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office, the Court must commit administration limited until there be an executor. . . .

"So it may be necessary to decree a limited administration till the will of the deceased can be produced in order to be admitted to probate" (*p*). Till will be found.

A will in existence, after the testator's death, being accidentally lost and the contents unknown, administration will be granted limited until the will be found and brought into the Registry (*q*).

"There may also be a grant of administration limited to certain specific effects of the deceased; and the general administration may be committed to a different person. Administration limited to a particular subject. But this sort of grant is entirely exceptional, and should not be made unless a very strong reason be given.

"Two administrations may well subsist together when there is no executor: but it should be observed that, regularly, no administration of any sort can be granted when there is an executor appointed; for he is *universi juris hæres* to his testator" (*r*). If there is an executor there can be no administrator.

Where a party applying for administration has no direct interest in the personal estate of the deceased, Party having no direct

(*o*) See *ante*, p. 117.

(*p*) Wms. on Exors., 9th ed. pp. 439, 440. See also *In the goods of Metcalfe*, 1 Add. 343.

(*q*) *In the goods of Campbell*, 2 Hagg. 555.

(*r*) Wms. on Exors., 9th ed. p. 444. See also *In the goods of Watts*, 1 S. & T. 538; 29 L. J., P. & M. 108; 8 W. R. 340; *In the goods of Somerset*, L. R., 1 P. & D. 350.

interest in
estate of
deceased.

Grant limited
to specific
bequest.

Grants to
substantiate
proceedings
in Chancery ;

or claim in
foreign Court,
&c.

except as assignee of part of it, the grant must be limited to the particular fund to which he satisfies the Court he is entitled (s).

And the Court granted administration, with will and codicil annexed, to a legatee of trust property belonging to the deceased, limited to such trust property as far as it was personally bequeathed to him by the codicil (t).

A grant of administration may also be made limited to substantiating proceedings in Chancery, or other proceedings. In such a case the grant runs, "to attend, supply, substantiate, and confirm the proceedings already had, or that shall or may be had in the said suit in the High Court of Chancery, or in any other cause or suit which may be commenced in the said Court, or in any other Court between the said parties or any other parties, touching or concerning the matters at issue in the said suit, and until a final decree shall be made or had therein, and the said decree carried into execution, and the execution thereof fully completed." But this form must be now read as modified by the Judicature Acts.

So grants have been made limited to file a bill in equity (u) ; to prove a debt under a decree (x) ; to the nominee of a trustee under a Scotch bankruptcy (y) ; to the nominee of the assignees of the executors of a surviving trustee (z) ; to substantiate claim in French Courts (a) ; and to bring an action for damages for negligence (b).

(s) *In the goods of Dodgson*, 1 S. & T. 260 ; 28 L. J., P. D. & A. 116 ; 5 Jur., N. S. 252.

(t) *In the goods of Prothero*, L. R., 3 P. & D. 330 ; 41 L. J., P. & M. 63 ; 25 L. T. 950 ; 20 W. R. 319.

(u) *Woolley v. Gordon*, 3 Phill. 315.

(x) *Howell v. Metcalfe*, 2 Add. 348.

(y) *Hawarden v. Dunlop*, 2 S. & T. 614 ; 31 L. J., P. & M. 180 ; 7 L. T. 251.

(z) *In the goods of Frampton*, 3 S. & T. 169 ; 9 Jur., N. S. 755 ; 8 L. T. 70 ; see also *In the goods of Turner*, 3 S. & T. 476 ; 33 L. J., P. & M. 180 ; 10 Jur., N. S. 708 ; *Burdon v. Morgan*, *In the goods of Longhurst*, L. R., 2 P. & D. 371 ; 41 L. J., P. & M. 26 ; 26 L. T. 405 ; 20 W. R. 613.

(a) *In the goods of Tucker*, 3 S. & T. 585 ; 34 L. J., P. & M. 29.

(b) *In the goods of Williams*, 31 L. J., P. & M. 40, n.

Before making a grant limited to substantiate proceedings in Chancery, the Court will not take into consideration the merits of the case, but will make the grant on a mere averment of interest (c). Court will not go into merits of case.

Where a decree of a Persian Court declared a Persian subject entitled to certain property in this country, and such decree was founded on a will, the Court, after hearing evidence of Persian law, made a grant limited to the property mentioned in a duly authenticated copy of the decree (d). Other limited grants—
Foreigner dying possessed of property in England.
Persian subject.
Member of Russian Imperial family.

By the law of Russia, all testamentary instruments executed by members of the Imperial family are disregarded, and the disposition of the property of such persons after their death is within the exclusive power of the Emperor of Russia. A., a member of the Imperial family, died in Russia, having executed a will by which he appointed B., his son, his executor. After A.'s death, a meeting of the members of his family was held, and an arrangement was agreed to for the disposition of his property in accordance with the terms of his will. This arrangement was embodied in a document termed *Acte définitif*, which was subsequently confirmed by the Emperor of Russia. By its terms B. was constituted the sole and entire owner of certain shares held by the deceased in a railway company having its offices in England. The Court, upon a certificate from the Russian ambassador in England with the seal of the Russian embassy, reciting that the law of Russia is as stated above, and that under the *Acte définitif* B. was the sole and entire owner of the railway shares, made a grant to the attorney of B. of letters of administration with the *Acte définitif* annexed, limited to the property of the deceased in England (e).

(c) *Maclean v. Davison*, 1 S. & T. 425.

(d) *In the goods of Dost Aly Khan*, 6 P. D. 6; 49 L. J., P. D. & A. 78; 29 W. R. 80.

(e) *In the goods of Prince Oldenburg*, 9 P. D. 234; 53 L. J., P. D. & A. 46; 32 W. R. 724; 49 J. P. 104.

Testator domiciled in New Zealand. Will proved in Court of domicil. Testamentary appointment in England not mentioned in New Zealand probate. Limited grant refused. Practice.

A testator died domiciled in New Zealand, having duly executed a testamentary appointment whilst on a visit to England. He left a will executed in New Zealand, which was duly proved in the New Zealand Courts, but no mention was made in the New Zealand probate of the English testamentary appointment. The Court refused a limited grant of administration with the testamentary appointment annexed, holding that the proper course was for the executors to apply to the New Zealand Courts for a fresh probate, including the testamentary appointment (*f*).

Limited grant refused to legatee of married woman without citing next of kin.

Where a married woman, who had lost sight of her husband for about twenty-seven years, left certain property to a man with whom she had lived in adultery for eight years, the Court refused to grant administration with the will annexed limited to the amount of his legacy, without citing the next of kin (*g*).

Limited grant to father of married woman in spite of husband's opposition.

The Court made a grant, in spite of the opposition of the husband, to the father of a married woman separated by deed from her husband, limited to certain separate estate that she became possessed of by virtue of the deed of separation (*h*).

Married Women's Property Act, 1882.

The limitation inserted before the Married Women's Property Act, 1882 (*i.e.*, to such personal estate as she had power to dispose of by will), is no longer required, and the Court now makes a general grant (*i*).

Form of probate since.

Deceased possessed of property in two provinces disposing of property by

"It might happen under the old practice that a man dying possessed of goods in two provinces made his will of the goods only in one of them, and died intestate as to the goods in the other province; in such case administration

(*f*) *In the goods of Crawford*, 15 P. D. 212; 60 L. J., P. D. & A. 16; 63 L. T. 232; 54 J. P. 504.

(*g*) *In the goods of Miles*, 59 L. J., P. D. & A. 59; 62 L. T. 607. (*In the goods of Watson*, 1 S. & T. 110, distinguished.)

(*h*) *Allen v. Humphrys*, or *Hum-*

phreys v. Allen, or *Humphrys*, *In re*, 8 P. D. 16; 52 L. J., P. D. & A. 24; 48 L. T. 125; 31 W. R. 292; 47 J. P. 24.

(*i*) *In the goods of Price*, 12 P. D. 137; 56 L. J., P. D. & A. 72; 57 L. T. 497; 35 W. R. 596; 51 J. P. 615.

might have been granted as to the goods whereof he died intestate" (k). will in one province only.

So, on the authority of the above passage, Jeune, J., in a recent case, where a woman died possessed of property both in England and America, leaving a will dealing with her American property only, made a grant of administration to her next of kin, limited to such property as she possessed in England (l). Practice of Ecclesiastical Courts followed where will dealt with property in America only, though deceased died possessed of property in England also.

Where a testator died possessed of large assets in Scotland, but of a small property only in England, and his executors proved his will in Scotland only, a legatee under the will of the deceased applied for a grant of administration limited to his estate in this country, which application was opposed by the executors. The Court held that it was not bound to make such a grant, but that its power was discretionary, and, it not having been shown that the executors were not doing their duty, there was no necessity for any grant in this country, and therefore refused the application (m). Large estate in Scotland; small estate only in England: limited grant of administration to English property refused.

As has been already seen (n), where there are no next of kin, creditors, or other person applicant for the administration, the Court has a discretionary power to grant *administration ad colligendum bona defuncti*. Grants of administration *ad colligendum bona defuncti*.

The above grant of administration is had recourse to by the Court generally where there is danger to the estate by reason of the same being of a perishable or precarious nature. Made where danger to estate.

When a sole next of kin refuses to take administration, the Court, on cause shown, will decree letters *ad colligendum bona defuncti*, limited according to the special circumstances of the case (o).

(k) Wms. on Exors., 9th ed. p. 451, citing Godolph. Pt. 2, c. 30, s. 5.

(l) *In the goods of Mann*, (1891) P. 293; 60 L. J., P. D. & A. 95; 40 W. R. 144.

(m) *In the goods of Ewing*, or *Hope v. Ewing*, 6 P. D. 19; 50 L. J., P. D. & A. 11; 44 L. T. 278; 29 W. R. 474; 45 J. P. 376.

(n) *Ante*, p. 225.

(o) *In the goods of Radnall*, 2 Add. 232.

Where loss likely to occur by delay.

When a loss to an estate was likely to occur if a grant of administration was delayed, the Court made a grant *ad colligendum bona* to a creditor, but directed that, after payment of necessary charges, the balance should be deposited in the registry until a general grant should issue (*p*).

To sell goodwill of business.

So where the deceased carried on the business of a schoolmaster, and an offer was made for the goodwill of the school if possession was given forthwith, the Court made a grant *ad colligendum bona* to a creditor, with power to dispose of the goodwill of the school, but directed that the administrator should bring into the registry the proceeds of the sale, after deducting his expenses and taxed costs of obtaining the administration (*q*).

To collect debts, give receipts, and renew lease, but not to sell goodwill of business or carry it on.

On the other hand, the Court, under special circumstances, made a grant to a creditor *ad colligendum bona*, limited to collect the personal estate of the deceased, to give receipts for debts, and to renew the lease of his business premises, but refused to include in the grant a power to dispose of the lease and goodwill of the business or to carry it on (*r*).

Foreigner dying intestate without known relative or agent: grant *ad colligendum bona* to responsible person without notice to Queen's Proctor.

When a foreigner dies intestate in this country *in itinere*, without any relative or agent here resident, the custody of his property belongs to the Crown; but, by reason of special circumstances, the Court, under 20 & 21 Viet. c. 77, s. 73, made, without formal notice to the Queen's Proctor, a grant *ad colligendum bona* to a responsible person (*s*).

The Court made a grant *ad colligendum bona* to a creditor, on affidavit that the deponent was informed and verily

(*p*) *In the goods of Stewart*, L. R., 1 P. & D. 727; 38 L. J., P. & M. 39; 20 L. T. 279.

(*q*) *In the goods of Schwerdtfeger*, L. R., 1 P. D. 424; 45 L. J., P. & M. 46; 34 L. T. 72; 24 W. R. 298.

(*r*) *In the goods of Clarkington*, 2 S. & T. 380; 7 L. T. 218; 8 Jur., N. S. 84; 10 W. R. 124.

(*s*) *In the goods of Wyckoff*, 3 S. & T. 20; 32 L. J., P. & M. 214; 9 Jur., N. S. 84; 7 L. T. 565; 11 W. R. 218.

believed that the deceased died a widow, without any known relatives and intestate (*t*). To creditor.

Under a grant *ad colligendum bona* made to the solicitor to the Treasury, the Court gave leave to the administrator to pay all pressing claims for rent, rates and taxes, to take the accounts of the manager of the testator's business, and to dispose of the said business (*u*). To solicitor to Treasury.

In cases of limited administrations, the parties entitled to the general grant may take out what is called a *cæterorum* representation, enabling them to deal with the rest of the estate (*x*). *Cæterorum* representation.

A grant "*save and except*" is the reverse of a *cæterorum* grant—it precedes instead of following the particular or limited grant. Grant save and except.

Where the representation is limited in point of *time*, it is obvious that, as the whole representation is granted, although only for a time, no other grant can be made until such time has elapsed. For instance, a grant made *durante absentia*, or *minore ætate*, is a grant of the whole representation, expiring on the return or coming of age of the party entitled. Then, and not till then, can the party entitled apply for a general and regular grant. This is called a supplemental or *cessate* grant. Although this grant is only required when the estate of the deceased has not been fully administered, yet a distinction is taken between a supplemental or *cessate* grant and a grant *de bonis*; because, in the latter case, the grant was originally of the entire representation; whereas, in the former, the original grant was determinable on the effluxion of time, or on the happening of a particular event. A *cessate* grant is a renewal of the entire original grant, while a grant *de bonis* is only a grant of so much as is unadministered, and Supplemental or *cessate* grants.

(*t*) *In the goods of Ashley*, 15 P. D. 120; 59 L. J., P. D. & A. 72. p. 449, citing *Harris v. Milburn*, 2 Hagg. 62. But see *In the goods of Currey*, 5 No. of Cas. Ecc. 54; see

(*u*) *In the goods of Oddy*, 62 L. T. 643. also Wms. on Exors., 8th ed.

(*x*) Wms. on Exors., 9th ed. p. 532.

Supplemental
or *cessate*
grants.

an administrator taking the former is obliged to give security to the same amount that the original administrator did in the first instance, although the estate may have been partly administered (z).

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 82.

Where it appeared that the whole of the estate had been distributed with the exception of the legacy to the proposed administrator, the Court, under the 82nd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), directed a bond to be taken for a cessate grant in the same amount as would have been required in the case of a grant *de bonis non*, viz., made the grant to the amount of double the value of the property remaining unadministered (a).

(z) *Abbott v. Abbott*, 2 Phill. 578. L. T. 702; 9 Jur., N. S. 756; 12

(a) *In the goods of Fozard*, 3 S. & W. R. 19.
T. 173; 32 L. J., P. & M. 160; 8

CHAPTER XIX.

PRACTICE AS TO PROBATE IN COMMON FORM AND ADMINISTRATION WITH THE WILL ANNEXED.

WE now proceed to the consideration of what are the practical steps necessary for obtaining grants of probate and administration; or, in other words, what is the “*practice*” or machinery adopted by the Probate Division for carrying into effect the principles laid down in the former portion of this Work.

As has been already seen, there are two sorts of probate granted by the Probate Division, viz., PROBATE IN SOLEMN FORM and PROBATE IN COMMON FORM.

The first of these will be considered hereafter, and we now proceed to see in what manner probate in Common Form is to be obtained.

PROBATE IN COMMON FORM.

The Probate Division will not admit to proof a will dealing only with real estate, unless it contains an appointment of executor (*a*); but where the will deals both with realty and personalty it is entitled to proof, and the disposition of real estate is equally with that of the personal estate subject to the authority of the grant issued; but where such a will is in dispute the heir-at-law must be cited or appear in that capacity (*b*).

(*a*) *Ante*, p. 124, note (*a*).

(*b*) And with regard to personalty the probate will confer no power to administer other than the estate of the deceased in England; cer-

tain Indian securities on which interest is payable in London are, however, to be deemed for this purpose personal estate in England. 23 Vict. c. 5, s. 1.

- Title to probate. Probate is granted only to—
 Executors named in or according to the tenor of the will;
 Executors for life;
 Executors substituted.
- Title to administration with will. Persons proving a will in any other character take letters of administration with the will annexed.
- Where to apply. Rules 1 and 2 permit application for probate in all cases to be made at the principal registry, and such application may be made either by the executor in person or by his solicitor. But such application may not be made by letter nor through the medium of an agent.
- It follows, therefore, that no person is compelled to apply for probate at a district registry, although he is entitled to do so (if he pleases) at the district registry within whose limits the testator at the time of his death had a fixed place of abode (*e*).
- Probate. The word *probate* is generally applied to the piece of parchment stamped with the seal of the Court, on which is ingrossed a statement in the nature of a record, that on a certain day the will of the deceased (naming the day of death and place of abode of the deceased) was proved and registered, and that administration of his estate was granted to the executor, he having first sworn faithfully to administer. The necessary steps that must ordinarily precede the grant appear to be—The executor must first file the oath of office, *i.e.*, the oath alluded to in the probate, and also that for the inland revenue.
- Oath of executor. The first of these is required from very early times by the common law; it is a promissory oath taken by the executor that he will execute the office justly. The second is required by 55 Geo. III. c. 184, s. 38, in order that the proper stamp-duty may be paid to the inland revenue (*f*).
- (*e*) For list of district registries, see *post*, Appendix.
- (*f*) By sect. 38 of 55 Geo. 3, c. 184, it is enacted, that “no person shall grant probate of the will or letters of administration of any person deceased without first requiring or receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit or

These two affidavits are all that are required in general; but circumstances may and frequently do arise, involving the necessity of other and further affidavits before probate will be granted. Affidavit for
Inland
Revenue.

By Rule 43, "No probate or letters of administration *with the will annexed* shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge or by order of two of the registrars." Time of
issuing grant.

By Rule 45, "in every case where probate . . . is for the first time applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit." Delay in ap-
plying for
grant.

This certificate or affidavit has to be filed, and a fee of 2s. for affidavit, or 2s. 6d. for certificate, is payable in respect of it.

By Rule 3, the registrars are not to allow probate to issue until all the inquiries they may see fit to institute have been answered to their satisfaction, but they are to afford as great facility for obtaining probate "as is consistent with the due regard to the prevention of error or fraud."

In considering the quality and amount of evidence necessary before granting probate of a testamentary paper, there is a great distinction between papers executed before and after the passing of the Wills Act.

As has been already observed, after fifty-four years

solemn affirmation, &c. that the estate, &c. of the deceased . . . exclusive of what the deceased shall have been possessed of or entitled to as a trustee . . . but including the leasehold estates of the deceased, whether absolute or determinable on lives, if any, and without deducting anything on account of the debts due . . . from the deceased, are *under the value of a certain sum*, to be therein specified," for the

purpose of paying the stamp duty.

The prohibition to deduct debts has been modified by 31 & 32 Vict. c. 124, s. 7, whereby, when leasehold estates are the sole security for mortgage debts, the amount of such debts may be deducted from the value of such leasehold estates.

And by 43 Vict. c. 14, an account of the personal estate of the deceased, signed by the deponents, is annexed to this affidavit.

cases of such wills become more and more rare every day. It will therefore suffice to say that the practice of the principal registry in the granting probate of testamentary papers bearing date before January 1st, 1838, is regulated by Rules P. R. (N.-C. B.) 1862, 17 to 27, inclusive.

Oath.

By Rule 46, "all probates . . . issued from the principal registry are to be filled up there."

By Rule 47, "the usual oath of executors and administrators with the will annexed is to be sworn as an affidavit, and filed in the registry."

Marking
will and
codicils an-
nexed to oath.

Forms of these affidavits will be found in the Appendix, and may be obtained from any law stationer, or at the Probate Registry. On reference to the form of the oath for an executor, it will be seen that he swears that he believes "the paper writing hereto annexed and marked by me" to contain the true and original last will and testament of the deceased. At the time of his swearing this affidavit, the original and codicils (if any) must be annexed, and the executor must *mark* them, which he does by signing his name on them. The commissioner or party who administers the oath also *marks* the will and codicils (if any) in a similar manner, by signing his name. But no form of certificate is necessary.

Identity of
executor.

Rule 48 "empowers the registrars at their discretion to require proof, in addition to the oath of the executor, of the identity of the deceased, or of the party applying for the grant."

Proof of identity is necessary in such cases as—

"I appoint Mr. Buchanan executor."

"I appoint Edward Brown," and Edwin Brown applies.

"I appoint my nephew Edwin Brown executor," and the wife's nephew applies; must be shown that testator had no nephew; also where

"I appoint my son Edwin Brown executor," and the son-in-law applies.

"I appoint my father executor;" father, in taking probate, must swear that he is the natural and lawful father.

“I appoint my mother executor;” mother, in taking probate, not required to swear she is the natural and lawful mother.

“I appoint my wife executor,” *and not otherwise named*; wife applying for probate must show that *she was the wife at the date of the will*.

We now proceed to offer some practical suggestions to solicitors applying for grants of probate.

Practical suggestions to solicitors.

The first step is to draw the oath and affidavit for the inland revenue, which have to be signed by the executor, and sworn before some duly-constituted authority according to the place where he happens to be at the time.

Then take the inland revenue affidavit to Room 25, Inland Revenue Office, Somerset House, and get the duty stamp impressed on it.

The oath and the affidavit for the inland revenue, the original will and the engrossment, must be taken, if in London, to the principal registry, and left with the RECEIVER OF PAPERS, (from whom all requisite fee stamps can be obtained,) or, if in the country, to the district registrar.

The officer to whom these documents are handed will give a receipt for them, which should be taken great care of, as without its production on applying at the *sealers* for the grant a difficulty will be experienced in obtaining it.

By Rule 79 (substituted for Rule 79, P. R. (N.-C. B.) 1862, and bearing date December 29th, 1865), “The registrars are to take care that the copies of wills and affidavits to be annexed to probates . . . are fairly and properly written, and are to reject those which are otherwise; but it shall not be necessary that such copies be written in the engrossing hand heretofore in use.”

The fair copy of the will to be annexed to the grant under rule 79 is called the engrossment. The old engrossing hand is not now insisted on; it is sufficient if the engrossment be written in a good clear round hand. Alterations and erasures should be avoided, especially so with the names of executors; and to prevent delay the

Engrossment of will.

Practical
suggestions
to solicitors.

engrossment should be carefully examined with the original will before being left at the registry.

The papers are then passed on from the receiver to the examiner of wills, and if the engrossment is found, upon his examination of it with the original will, to be correct, they are in due course taken to the *clerk of the seat*, according to the initial letter of the surname of deceased.

To facilitate the despatch of business, and for the more convenient arrangement of the calendars and to save the time of solicitors requiring to attend at the registry with reference to grants passing, the seats are arranged by the following division of the alphabet:—A to Ch, Ci to Gd, Ge to Kek, Kel to Par, Pas to Std, Ste to Z.

The importance of the duties of the clerks of seats cannot be over-estimated.

Prior to the grant being sent to the registrar for his final inspection and signature, the clerk of the seat has to carefully inspect the will, to see, in the first instance, whether it is duly executed and entitled to probate, to determine the character of the grantee, to observe all imperfections in the documents presented for proof, and to direct such affidavits as he may deem requisite, in explanation or verification, to be obtained by the solicitor. When he is satisfied of the accuracy of the documents, and no impediment stands in the way of the grant passing (such as a caveat or an existing grant in the estate of the deceased) (*n*), he causes the probate to be filled up and annexed to the engrossment, and forwards it to the registrar for signature.

The registrar, finding the grant to be correct, signs it. It then passes to the sealer, who examines the fee sheet to see that the requisite stamps have been obtained (*n*), takes a note of the grant, and affixes the seal of the Court to it, and (unless a caveat against the grant being given out is entered in his department) the sealer will deliver it to any

(*n*) As to *caveats*, see *post*, p. 376.

(*n*) All information as to stamps, and also the stamps themselves,

may be obtained at the principal registry from THE RECEIVER OF PAPERS.

person producing the receipt of the receiver of papers, retaining such receipt. Practical suggestions to solicitors.

The time usually occupied by these proceedings is two or three days according to the length of the will, and pre-supposing that the documents are accurately drawn.

The original will remains in the registry and is copied into the books of the Court (called the registration of the will), which may be inspected at the principal registry by any person paying 1s. for a search stamp.

A memorandum of the grant called the Probate Act is made by a clerk of the seat on the will itself, and records of the grants are also made and bound up for reference.

The affidavit for the inland revenue is not permanently filed, and therefore does not require a stamp.

A fee of 2s. is also charged on every other affidavit, and 2s. 6d. on every certificate, renunciation, &c., filed with the papers.

The will, codicils, and oath are filed without any fee stamp (o).

SECT. 33 OF 44 VICT. c. 12.

This section—which is an important example of legislation lightening the incidence of taxation upon small estates—enacts that where the whole personal estate and effects, wherever situate, of any person dying on or after the 1st of June, 1881, shall not exceed the value of 300l. Estates not exceeding 300l.—without any deduction for debts or funeral expenses—the payment of 30s. duty, and 15s. Court fees shall be deemed a full discharge of all duties and fees payable on such estate. A subsequent section of the same Act (sect. 36), provides that the above-mentioned sum of 30s. shall also be deemed a full satisfaction for any claim to legacy or succession duty in respect of such estate.

In estates under 100l. the payment of 15s. fees is deemed Under 100l. a full discharge of all revenue claims. Although it is frequently advantageous for the executor or administrator to avail himself of sect. 33 on estates under 100l., it is open Alternative fee.

(o) The stamp duties will be found in the Appendix.

for him to pay the fees in accordance with the ordinary scale, and in those cases where the fees would not amount to 15s. it is generally his interest to do so. For instance, an estate may be under 100*l.* and the will may be only three to six folios in length—the fees under the ordinary scale would, if the deceased had died during the last twelvemonth, be usually only 9s. 6*d.* to 14s.—and in the case of an intestacy under the same amount, only 5s.—in such cases the 33rd section would be of no advantage. On the other hand, where the will is of seven or more folios the section would be cheaper.

This alternative in reference to fees only applies to estates under 100*l.*; in estates over 100*l.* and under 300*l.* the 15s. fee must be paid in accordance with the section. It may, perhaps, be well to mention that the payment of the 30s. duty and 15s. fees does not include the impressed stamp on the bond, when required, which is 5s.

Increasing
the grant.

Again, if an estate taken under this section be subsequently increased above 300*l.*, the full *ad valorem* duty will have to be paid on the whole estate, and no allowance made for the 30s. already paid. This is provided for by sect. 35 of the same Act.

Adhesive
stamps.

Adhesive duty stamps can be obtained at Room 7, Inland Revenue Department, Somerset House, for amounts ranging from 30s. to 25*l.*

Impressed
stamps.

Stamp duties are impressed at Room 25 of the same Department up to the amount of 75*l.*, while the party waits. Cheques are taken in payment, but they must be drawn or endorsed in favour of "The Commissioners of Inland Revenue."

Cheques.

To assist solicitors in obtaining probate in common form, a practical illustration of a grant from its commencement to its close is subjoined.

It will be observed that the case chosen is one in which probate is granted to one of two executors, power being reserved to the other to come in and prove. In this case a copy of the account No. 1 annexed to the affidavit of Inland Revenue must be filed.

Philip Myrtle,
Sidney Heath,
Commissioner, &c.

Will.

This is the last will and testament of me, John Hammel, of the City of London, merchant. I do hereby give, devise, and bequeath all my real and personal estate to my wife Mary Hammel during her life, and afterwards between my children equally. I appoint Philip Myrtle and Thomas Boyle executors. Dated first January, 1890.

Signed by testator in our presence and by us } JOHN HAMMEL.
in his, }
THOMAS CANNING.
JOSEPH ALLISON.

Oath for Executors.

[*Solicitor's Name and Address.*]

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.
(Principal Probate Registry.)

In the goods of John Hammel, deceased.

Insert the names, residences, and titles or additions of the deponents and the relationship, if any, of the executors to the testator.

In case of affirmation, insert form of affirmation prescribed by act of parliament.

Each testamentary paper to be marked by the person sworn, and by the person administering the oath.

Power reserved to }
Thomas Boyle, }
the other executor. }

I, Philip Myrtle, of 15, Royal Exchange Buildings, in the City of London, stockbroker, make oath and say, that I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said John Hammel, late of 7, Finsbury Square, in the City of London, deceased; that I am one of the executors therein named; and that I will well and faithfully administer the personal estate and effects of the said testator by paying his just debts, and the legacies contained in his will, so far as the same shall thereto extend and the law bind me; and that I will exhibit a true and perfect inventory of all and singular the said estate and effects, and render a just and true account thereof whenever required by law so to do; that the testator died at 7, Finsbury Square, aforesaid, on the 3rd day of January, 1892; and that the gross value of the personal estate of the said testator amounts in value to the sum of six hundred pounds, and no more, to the best of my knowledge, information, and belief.

Sworn by Philip Myrtle, at No. 7, Old Broad Street, }
in the City of London, this 29th day of April, 1892, } PHILIP MYRTLE.
Before me, }
SIDNEY HEATH,
A Commissioner to administer Oaths in the
Supreme Court of Judicature.

The Engrossment.

[On Parchment.]

This is the last will and testament of me, John Hammel, of the city of London, merchant. I do hereby give, devise and bequeath all my real and personal estate to my wife, Mary Hammel, during her life, and afterwards between my children equally. I appoint Philip Myrtle and Thomas Boyle, executors. Dated

1st January, 1890, John Hammel. Signed by testator in our presence and by us in his. Thomas Canning, Joseph Allison.

This folds up and is endorsed :

Probate of the Will of
JOHN HAMMEL,
deceased,
Dated 5th May, 1892.

Extracted by
Messrs. Squire & Co. }
Solicitors, Lincoln's Inn Fields.

Probate.

THE PRINCIPAL REGISTRY.

The affidavit bears a
stamp of £ .

Extracted by Messrs. Squire & Co.,
Solicitors, Lincoln's Inn Fields.

IN HER MAJESTY'S HIGH COURT OF JUSTICE.

Be it known that at the date hereunder written, the last will and testament (a copy whereof is hereunto annexed) of John Hammel, late of 7, Finsbury Square, in the city of London, deceased, who died on the 3rd day of January, 1890, at 7, Finsbury Square aforesaid, was proved and registered in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice, and that administration of the personal estate of the said deceased was granted by the aforesaid Court to Philip Myrtle, one of the executors named in the said will, he having been first sworn well and faithfully to administer the same. Power being reserved of making the like grant to Thomas Boyle, the other executor. And it is hereby certified that an affidavit in verification of the account of the said estate has been delivered, wherein it is shown that the gross value of the said estate amounts to 600*l.* and no more.

Dated the 5th day of May, 1892.

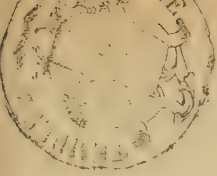
A. B.,
Registrar.

"Estate Duty" on Probates and Administrations.

Acknowledgments of the payment of this duty are issued from the Legacy and Succession Duty Office, Somerset House, and will be forwarded by post, as soon as may be, after the estate duty "Statement," with the Inland Revenue affidavit, reach that office. These will be sent without any application.

Certificates of the payment will, at the request of the parties, be put upon the grant itself as soon as the contents of the affidavit and "Statement" have been found satisfactory.

For this purpose the grant must be produced personally or by agent (not sent by post), at Room No. 44 of the Legacy and Succession Duty Office.



Fees.

[Stamps to be obtained at the Receiver's.]

THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Probate.)

PRINCIPAL REGISTRY.

John Hammel, deceased.

WILL.

		£	s.	d.
Receiver and Examiner.	Receipt	0	1	0
	Registering and Collating Will (5 folios)	0	7	6
	„ fac simile or pencil Writing	0	0	0
	(Engrossing and Collating Will, d. b. or engrossed in Registry)..	0	0	0
	„ fac simile or pencil Writing, 6d. fol. engrossing	0	0	0
	Collating Copy to Register from, not less than two folios charged..	0	0	0
	Attesting Bond	0	0	0
	Filing Fees :—			
	Renunciation	0	0	0
	Other Affidavits or Certificates	0	0	0
Seats.	Probate or Administration Will, including Administration Will de bonis non, Double or Duplicate Probate, Special, Limited, or Cessate Grant (with Will, &c. under Seal under 600 <i>l</i> .)	0	16	6
	Search	0	0	6
	Noting Record of First Grant.....	0	0	0
	Registrar's Fiat	0	0	0
	Perusing and settling Oath	0	0	0
	Special or Limited Grant	0	0	0
	„ „ Act	0	0	0
	„ „ Bond	0	0	0
	Noting Domicile.....	0	0	0
	Registrar's Certificate	0	2	6
	Oath delivered.	£1	8	0

Receipt.

No. 132. HER MAJESTY'S HIGH COURT OF JUSTICE.

PRINCIPAL PROBATE REGISTRY.

In the Goods of John Hammel, late of 7, Finsbury Square, in the
City of London.

Received the 2nd day of May, 1892, of

Will

Oath

Affidavit

Fees

Engrossment

Returned

L. C.

Receiver of Papers for Examination.

— Clerk of Seat.

This Receipt must be produced when any enquiry is made respecting this business, and must be left with the Sealer on delivery of the Probate, from whom it can be obtained after 12.30 o'clock on the day following that on which it is put forward by the Clerk of the Seat, if then approved and signed by the Registrar. And take notice, that no alteration will be made in a Grant after it has been removed from the Registry, unless by order of one of the Registrars, and on payment of the usual fees.

Bill of Costs.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Probate.)

In the goods of John Hammel, deceased.

	£	s.	d.
Instructions for probate	0	6	8
Perusing and considering will, 4 <i>d.</i> a folio of 72 words (3 folios)	0	1	0
Drawing and engrossing oath of the executor and attending on his being sworn thereto	0	10	0
Paid Commissioner	0	1	6
" " marking will	0	1	0
Drawing and engrossing affidavit for Inland Revenue and attending on executor being sworn	0	10	0
Paid Commissioner	0	1	6
Registering, engrossing and collating the will 4 <i>s.</i> 6 <i>d.</i> each	0	9	0
Attending at the Stamp Office, paying the duty, and procuring same duly stamped on the affidavit	0	13	4
Attending at Registry with the papers for the grant, lodging same, and obtaining receipt	0	6	8
Paid stamp duty	11	0	0
Stamp fee on search	0	0	6
Probate under seal—			
Extracting	0	6	8
Clerk's fee	0	2	0
Paid Court fees	0	16	6
Engrossing and collating will (3 folios of 90 words or under)	0	4	6
Probate under seal	0	16	6
Letters, messengers, &c.	0	5	0
	£16	12	4

Before the will leaves the Clerk of the Seat for registration and filing the following act is written upon it:—

On the 5th May, 1892, probate of this will was granted to Philip Myrtle, one of the executors.

The Record.

Be it known that at the date hereunder written the last will and testament of John Hammel, late of 7, Finsbury Square, in the City of London, merchant, deceased, who died on the 3rd day of January, 1892, at 7, Finsbury Square, aforesaid, was proved and registered in the Principal Probate Registry of her Majesty's High Court of Justice, and that administration of the personal estate of the said deceased was granted by the aforesaid Court to Philip Myrtle, of 15, Royal Exchange Buildings, in the City of London, stock broker, one of the executors named in the said will, he having been first sworn well and faithfully to administer the same. Power reserved of making the like grant to Thomas Boyle, the other executor named in the said will.

Dated the 5th day of May, 1892.

Gross value of personal estate 600*l.*

The will is then registered (on parchment) in the form of the engrossment, and the original will is then endorsed, and remains in the custody of the record keepers, filed in the strong room.

The registered copy will is (with others) bound, as also the record.

From these acts and record it will be seen that any one desiring to ascertain the address of the proving executor would have to look at the *record*; for the name of the extracting solicitor he must see the *oath*. The amount under which the personal estate is sworn appears in the *record*; but all these particulars are contained in the *oath (a)*.

DUPLICATE WILL.

If a will or codicil exists in duplicate, and one part is presented for probate, the production of the duplicate is required. A note is made on the document proved, and also in the margin of the executor's oath "Duplicate produced," but not on the engrossment or probate.

If the duplicate is not forthcoming the Registrars must be satisfied on affidavit as to what has become of it, and whether the part brought in for probate was in the testator's possession at the time of his death. If not satisfied, the registrars will either refuse probate absolutely, or send the parties to take the opinion of the Court on motion (*b*).

INCORPORATION OF DOCUMENTS.

Rules 12 and 13 provide that where "any deed, paper, memorandum, or other document," is referred to in a testamentary paper, and the reference raises "a question whether it ought or ought not to form a constituent part

(*a*) All this information, however, is supplied in calendars, which are printed from time to time. At the present date (March, 1892) these calendars are complete up to the end of 1889.

(*b*) Of course the parties are at liberty to apply to the Court, if they so please, whatever the registrar's decision on the subject may be. *Killican v. Parker*, 1 Lee, 662; *Boughey v. Morton*, 3 Hagg. 191; *Slade, deceased*, 20 L. T. R. 330,

of the will" (which cannot be unless it was in existence at the date of execution (c)), its production is required "with a view to ascertain whether it is entitled to probate; and if not produced, its non-production must be accounted for."

Sealing wax
or other
marks on
wills.

By Rule 14, "If there are any vestiges of sealing wax or wafers, or other marks upon a testamentary paper, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required; and if not produced, its non-production must be accounted for."

Incorporated
documents.

When another document is incorporated by a will, it must be engrossed and registered, and the will is sworn to as "*contained in paper writings marked A. B. &c.*"

If, however, the document to be incorporated be another will which has been proved, and either the executor of both wills is the same person, or the testator himself was the executor of the first will, then the first will is not engrossed and registered with the second, but an affidavit of the fact is made by the executor, and filed, and a memorandum of the fact written in the margin of the engrossment. This is sometimes done in other cases of incorporation.

INTERLINEATIONS, ALTERATIONS, ERASURES, AND OBLITERATIONS.

Regulations as to these are provided by Rules 8 to 11 inclusive. Rule 8 is merely declaratory as to the law relating to the validity of interlineations and alterations (d).

By Rule 9, "Where interlineations or alterations appear in the will (unless duly executed or recited in, or otherwise identified by the attestation clause), an affidavit or affidavits of their having existed in the will before its execu-

(c) *Ante*, p. 137.

(d) *Ante*, p. 157.

tion must be filed, except when the alterations are merely verbal, or of but small importance, and are evidenced by the initials of the attesting witnesses."

Rule 10 sets forth what is the law as to the validity of erasures and obliterations (*e*), and provides further that "if no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate."

Rule 11 requires an affidavit wherever words "*which might have been of importance*" have been 'erased or obliterated.

If a testamentary paper contain alterations, interlineations, &c., which can be satisfactorily shown, either by evidence on the face of the document itself (*e*) or on affidavit, to have been made prior to the execution, the alterations, interlineations, &c., are incorporated in the copy by omitting words that have been erased and inserting words that have been introduced, as interlineations, into the body of the text. If there is *pencil writing* in the paper, a copy of the document, *with the pencil writing in red ink*, is required to be filed with the will to perpetuate it.

If the attesting witnesses, or others, are unable to account for or explain the alterations or interlineations, the will must be engrossed as originally written, and if this cannot be made out, an affidavit of an expert must be filed, and if he cannot decipher what was originally written, a blank must be left in the engrossment for such portions as cannot be deciphered; and in such cases, if the alterations, interlineations, &c., are such as ought to be excluded from the probate, a copy of the whole will, or portions of the will, as it would have been in its original state (*i.e.*, without the interlineations and alterations), or with blank

spaces, must be made and handed to the Receiver of Papers for collation with the original. Space must be left above the copy for one of the Registrars to write these words: "Let the will of —— be registered from this copy thereof," or "Let the will or 1st sheet be registered from this copy." This is termed a fiat, and upon it a fee of 5s. is payable.

BLIND OR ILLITERATE.

Rule 71 regulates the issuing of grants where the testator was either blind or obviously illiterate or ignorant, in which case the Registrars are not to allow the grant to issue, until they have satisfied themselves that the will was read over to the testator before execution, and that he had at such time a knowledge of its contents.

IMPERFECT ATTESTATION CLAUSE.

Rule 4. "If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereunto be insufficient the Registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution were, in fact, complied with."

Subscribing
witnesses
dead.

By Rule 7, "If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact, and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of due execution."

By Rule 5, the Registrars are to refuse probate if "by the *affidavits of both the subscribing witnesses*" it appears that the requirements of the statute were not complied

with. And by Rule 6, if it appear on perusal of "*the affidavit or affidavits setting forth the facts of the case*" that it is doubtful whether a testamentary paper was duly executed or not, the Registrars may require the matter to be brought before the Court on motion. Doubtful execution.

By Rule 4A, "The practice of registering affidavits shall be discontinued, and in lieu thereof a note, signed by a Registrar, shall be inserted in margin of the engrossed copy, will or codicil, annexed to the probate or letters of administration and registered, to the effect that affidavits of due execution, of domicile, or as the case may be, have been filed: provided, that in cases presenting difficulty, the affidavits themselves may still be registered by direction of a Registrar." Affidavits not to be registered.

All alterations which may be of importance should be attested by the testator and two witnesses; all erasures with a knife should be accounted for by affidavit, unless the alteration is distinctly recited in the attestation clause. Alterations to be attested.

WILL INSUFFICIENTLY DATED.

If a will be undated or imperfectly dated, one of the attesting witnesses should supply the date on affidavit, but if neither of the attesting witnesses nor any other person can supply it, then evidence should be adduced to show that the document is the latest, or the only will of the testator, and then affidavit of search must be filed.

The same observations apply to codicils, with the exception that in the latter case it will probably be sufficient, in the absence of better evidence, to show that the document was carefully preserved by the testator among his papers of importance, but if the codicil refers to the will by a wrong date, an affidavit of search is generally required.

Will dated the — day of May, 1880, the day being deposed to by an attesting witness. Probate is granted of the will bearing date the — day of May, 1880, but in fact executed on the second day of May, 1880—so if the

day and month be both omitted;—and if no date at all. Probate is granted of the will “being without date but in fact executed on the second day of May, 1880, or in the month of May or June, 1880, as the evidence adduced furnishes.”

Affidavit by
subscribing
witness to
show how will
was executed.

By Rule 57, “In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose to the manner in which such will or codicil was executed and attested.” It is not necessary to repeat this evidence if the witness makes more than one affidavit.

LOST WILLS.

Where an executor applies for probate of a true copy or draft of an original testamentary document lost since the death of the testator, he must be prepared to show by affidavit—(1) the due execution of the original will; (2) that it has been in existence since the testator’s death and has been lost; and (3) that the copy is a true one.

Advertising.

When it is necessary to advertise, the form of the advertisement is settled by the applicant or his solicitor, who usually takes the directions of a Registrar as to the newspapers in which it is to be inserted. If the document is not recovered by means of the advertisements, an affidavit to that effect is necessary, and the next of kin should consent.

Draft of a
will, &c.

To obtain probate of a draft of a testamentary paper which has been lost, or of the contents of such a document as established by parol evidence on motion, it is necessary that the next of kin and the persons entitled in distribution should all consent, otherwise the document will have to be propounded. But in every case the due execution must be proved, and the affidavit as to execution engrossed on the probate.

Copy—or
draft will.

All grants of copy or draft will are limited “*until the original or more authentic copy be brought into the registry.*”

Rules 4 to 16 inclusive regulate grants of probate and administration with the will annexed of testamentary papers dated after December 31st, 1837.

Rules 17 to 27 inclusive regulate grants of testamentary papers bearing date before January 1st, 1838.

The remaining rules, relating to grants of probate or letters of administration with the will annexed, are general.

DOUBLE PROBATE—SEVERAL EXECUTORS—POWER RESERVED.

Where several persons are named as executors it is not necessary for all to prove together, one, even without notice to the others, may prove the will, and in such case power is reserved to grant probate to the other executors. In such cases, one probate having issued, another executor wishing to prove takes what is termed a double probate—Double probate. power again being reserved to the other executors who have not proved—the next executor proving takes a treble probate. In cases of double probate (or second grants) the engrossment of the will to be annexed to the grant is made in the registry, or, if brought in by the solicitor for purpose of expedition, is charged for as made in the Registry.

The original will being in the Registry, the executor taking double probate has three courses open to him. He may attend at the registry and be sworn to the will, and mark it before one of the commissioners in the registry, or he may be sworn to and mark the probate already granted if it issued since the Probate Act, 1858, and the executor who first proved the will be dead, in which case the first probate is kept in the registry, or he may be sworn to and mark an office copy of the will under seal of the Court before any person qualified to administer oaths in the Supreme Court.

How the executor may be sworn.

Corresponding changes must be made in the affidavits

to suit these different cases, and the oath of the second executor must contain a statement of the will having been proved by the first executor, and that power has been reserved to the applicant of having the like grant made to him. See Forms, Appendix.

Duty, how paid.

The duty is not required to be paid again, a duty paid stamp or free mark will be given at the Inland Revenue Office.

Amount of estate.

Double probate generally issues under the same amount of personal estate, but one executor is not bound to follow the estimated value of the estate made by another executor. He may prove under a lesser or greater sum (*d*), proportionately increasing the duty.

“Duty paid” stamp, or free mark.

The executor having sworn the following oath and affidavit, and marked the will, the solicitor will leave with the proper officer at the Probate Duty Department, Inland Revenue, Somerset House (Room 4), the following memorial, and upon being told that the prayer is granted he will take the affidavit for the Commissioners of Inland Revenue to Room No. 31 in the Inland Revenue Office, Somerset House, for a “duty paid” stamp to be impressed upon it.

Register No. 18 Folio .

TO THE HONOURABLE THE COMMISSIONERS OF HER MAJESTY’S INLAND REVENUE.

The Memorial of Messrs. Squire & Co., of Lincoln’s Inn Fields, W.C., Solicitors of Thomas Boyle, of 18, Preston Street, Hackney, in the County of Middlesex, Accountant,

Sheweth,

That John Hammel, late of 7, Finsbury Square, in the City of London, stockbroker, deceased, died on the third day of January, 1890.

That on the 5th day of May, 1892, probate of his will was granted at the Principal Registry of the Probate Division of Her Majesty’s High Court of Justice, to Philip Myrtle, one of the executors named in the said will.

The said Philip Myrtle swore the personal estate and effects of the said deceased to amount in value to six hundred pounds and no more, and paid a stamp duty of eleven pounds.

(*d*) *In the goods of Bell*, L. R., 2 P. & D. 247; 40 L. J., P. & M. 67; 25 L. T. 163.

The personal estate and effects of the said deceased for or in respect of which the said probate was granted consisted of the following items, namely :—

	£	s.	d.
Cash at bankers	150	0	0
Household goods valued at	230	0	0
Rents of leasehold property due at death of deceased	20	0	0
Rents of ditto due since the death of deceased to date of grant	5	0	0
Policy of insurance on life	100	0	0
Goodwill, stock in trade, &c., valued at	30	0	0

In cases of de bonis grants }
state also what part of such items }
remain unadministered. }

£535 0 0

The said Thomas Boyle, who is the other executor of the said will, now applies for a double probate thereof, and hath sworn the personal estate and effects of the said John Hammel, deceased, to amount in value to six hundred pounds and no more.

Your Memorialists therefore humbly pray that your Honourable Board will be pleased to grant the usual duty paid stamp for the proposed new grant.

Dated this 1st day of August, 1892.

Oath for Double Probate.

[*Solicitor's name and address.*]

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division.

(Probate Registry.)

In the goods of John Hammel, deceased.

Insert the names, residences, and titles or additions of the deponents, and relationship, if any, of the executors to the testator, commencing "I or we."

In case of affirmation, insert form of affirmation prescribed by act of parliament.

"The true and original," or "a true and official copy of the," or "the probate of the," or as the case may be.

"This court," or "the district registry of this court at _____," or as the case may be.

"I am the other," or "one of the other," or "the now surviving."

The double probate must be sworn under the same amount as the first probate. (See page 274.)

I, Thomas Boyle, of 18, Preston Street, Hackney, in the County of Middlesex, accountant, make oath and say, that I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said John Hammel, late of 7, Finsbury Square, in the City of London, deceased; that in the month of May, 1892, probate of the said will was by authority and under seal of this Court granted to Philip Myrtle, one of the executors named in the said will; power being reserved of making the like grant to Thomas Boyle, the other executor therein named; that I am the other executor named in the said will, and that I will well and faithfully administer the personal estate and effects of the said testator by paying his just debts and the legacies contained in his will, so far as the same shall thereto extend and the law bind me; and that I will exhibit a true and perfect inventory of all and singular the said estate and effects, and render a just and true account thereof whenever required by law so to do; that the testator died at 7, Finsbury Square aforesaid, on the 3rd day of January, 1890; and that the whole of the personal estate and effects of the said testator amounts in value to the sum of six hundred pounds and no more, to the best of my knowledge, information, and belief.

Sworn at the Principal Probate Registry, Somerset House, Strand, in the County of Middlesex, this }
30th day of July, 1892,

THOMAS BOYLE.

Before me,

HORACE MONTI,
A Commissioner to administer Oaths in the
Supreme Court of Judicature.

Affidavit for the Commissioners of Inland Revenue.—[Same in substance as that for first Executor.]

Double Probate.

THE PRINCIPAL REGISTRY.
IN HER MAJESTY'S HIGH COURT OF JUSTICE.
Be it known that on the 5th day of May, 1892, the last will and testament (a copy whereof is hereunto annexed) of John Hammel, late of 7, Finsbury Square, in the city of London, deceased, who died on the third day of January, 1892, at 7, Finsbury Square, aforesaid, was proved and registered in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice, and that administration of the personal estate of the said deceased was granted by the aforesaid Court to Philip Myrtle, one of the executors named in the said will, power being reserved of making the like grant to Thomas Boyle, the other executor named in the said will. And be it further known, that at the date hereunder written, the said will of the said deceased was also proved in the said Principal Registry of the Probate Division of Her Majesty's High Court of Justice, and that the like administration of the personal estate of the said deceased was granted by the aforesaid Court to the said Thomas Boyle, the other executor named in the said will as aforesaid, he having been first duly sworn well and faithfully to administer the same.

Dated the 12th day of August, 1892.

A. B.,
Registrar.

Proved at London, 12th August, 1892, by the oath of Thomas Boyle, the other executor to whom administration was granted.

A further record is written and a notation made on the first record that "Double probate passed at London, August, 1892."

Fees.

Seats.	£ s. d.		
	Receipt	0	1 0
	Probate or Administration Will, including Administration Will de bonis non, Double or Duplicate Probate, Special, Limited, or Cessate Grant (with Will, &c. under Seal under £600)	0	12 6
	Engrossing and Collating Will (3 folios)	0	4 6
	Copy Act	0	2 6
	Noting Record of First Grant	0	2 6
	Certificate of Registrar	0	2 6
Oath delivered.			£1 5 6

Bill of Costs.

	£	s.	d.
Instruction for double probate	0	6	8
Drawing and engrossing oath of executor and attending on his being sworn..	0	10	0
Paid Commissioner	0	1	6
Drawing and engrossing affidavit for Inland Revenue, and attending executor being sworn	0	10	0
Paid Commissioner	0	1	6
Marking will	0	1	0
Attending at Registry, looking up will, and bespeaking the engrossment ..	0	6	8
Paid for same (3 folios)	0	4	6
Paid for search	0	0	0
Also ordering copy record for clerk of seat	0	0	0
Paid for same	0	2	6
Collating same	0	1	0
Perusing will	0	1	0
Instructions for memorial to the Commissioner of Inland Revenue for a duty- paid stamp	0	6	8
Drawing and engrossing same (ad val. fee)	0	10	0
Attending the Commissioners of Stamps, and lodging same and submitting the original grant for inspection	0	6	8
Attending at the Stamp Office, and procuring the duty-paid stamp	0	13	4
Attending at Receiver of Papers, and lodging affidavits	0	6	8
Paid for receipt	0	1	0
Paid for noting former grant	0	2	6
Attending at Registry for the probate piece in order to procure the same being stamped duty paid	0	6	8
Attending at the Stamp Office and leaving same, and afterwards to obtain it when stamped	0	13	4
Attending at Registry with the duty-paid stamp	0	6	8
Double probate under seal	0	12	6
Extracting	0	6	8
Clerks	0	2	0
	£7	1	0

LIMITED GRANTS.

The nature of these grants has been already referred to, *vide ante*, Chap. XVIII.

The oath to lead such grants must be settled in the Registry. Indeed, in many instances, the facts are so complicated, and the requirements of the Court so intricate, that it is only with the aid of the skilled experience of a Clerk of Seat that they can be reduced into form. In drafting the oath the solicitor should set out clearly—not too profusely—the facts of the case, commencing from the creation of the trust or other special circumstances.

Limited Probate and Special Administration of a married woman's will is no longer granted, Probate being taken in general form (*e*).

(*e*) *Price*, 12 P. D. and 57 L. T.; *Homfray*, 12 P. D. note, p. 138.

Oath—Administration—Rest of Goods.

[*This grant is now only made when a limited probate has been granted and the executor is still alive and the chain of executorship is kept up.*]

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division.

(The Principal Probate Registry.)

In the goods of A. D. (wife of C. D.), deceased.

These recitals to be the same as in the limited probate.

I, C. D., of , in the county of , gentleman, make oath and say, that the said A. D. (wife of me the said C. D.), late of , in the county of , deceased, died on the day of 18 , at , having during her coverture with the said C. D., by virtue of a certain indenture of settlement bearing date the day of , 18 , and made between E. F. of , in the county of , gentleman, of the first part, the said deceased by her then name and description of G. H. of , spinster, of the second part, and I. K. of , gentleman, and the said C. D. of , in the county of , gentleman, of the third part [and of all other powers and authorities her enabling] made and executed her last will and testament bearing date the day of , 1880, and thereof appointed her husband me the deponent sole executor. And be it also known that in the month of , 1890, probate of the said will limited to the administration of all such personal estate and effects as she the deceased by virtue of the aforesaid indenture had a right to appoint or dispose of and hath in and by her said will appointed or disposed of accordingly, but no further or otherwise, was granted by authority of the Principal Registry of the said Probate Division to me the said C. D. the sole executor named in the said will as aforesaid. And I further make oath that the said deceased died intestate as to rest of her personal estate, and that I am her lawful husband; that I will faithfully administer the said rest of the personal estate and effects of the said deceased, save and except any personal estate which vested in her as the sole or surviving executor of any other person, by paying her just debts, and distributing the residue of her said estate and effects according to law; that I will exhibit a true and perfect inventory of all and singular the said rest of her estate and effects and render a just and true account thereof whenever required by law so to do; and that the said rest of the personal estate and effects of the said deceased amounts in value to the sum of eight hundred pounds and no more, to the best of my knowledge, information, and belief.

Sworn by the said C. D., at Reading, in the }
county of Berks, this 1st day of May, 1892, }
Before me, M. P. }

A Commissioner to administer Oaths in the
Supreme Court of Judicature.

The bond in this case is prepared by the Clerk of the Seat; fee,
2s. per folio.

LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED ARE
GRANTED TO—

Attorney of executor, if abroad ;
Guardian of executor, if a minor ;
Committee of executor, if a lunatic ;
Universal or residuary legatee in trust, if no executor,
Universal or residuary legatee for life, if no executor, } or execu-
Universal or residuary legatee, if no executor, } tor ap-
Universal or residuary legatee substituted, if no executor, } pointed
Or their guardians, if minors. } and has re-
nounced ;

If there be no executor or residuary legatee (or such appointed and have renounced), to relict or next of kin or person entitled to undisposed-of residue.

If residuary legatees renounce, to next of kin, legatee, or a creditor, whichever first applies.

The following are forms of grants of administration with the will annexed to the residuary legatee for life, upon the renunciation of the executor, and of administration with the will annexed *de bonis non* to a residuary legatee substituted.

Will.

This is the last will and testament of me, Henry Thorn, of Moreton Street, in the city of Manchester, stationer. I give and bequeath all my household goods and furniture, plate, linen and china, books and pictures, and also all money which may be in my house, or which may be due to me at my decease, and all other my monies and stocks in the public funds, securities for money, and all other my personal estate, subject to the payment of my just debts, and funeral and testamentary expenses of same unto George Poole, in trust to pay the income to be derived from the investment to my dear wife Louisa Thorn during her life, and after her death the same to be equally divided amongst my children, share and share alike, and I appoint my friend the said George Poole sole executor. In witness whereof I have hereto set my hand this 7th day of June, 1890.

Signed by the testator in our presence } HENRY THORN.
and by us in his, }
WILLIAM GOUGH.
ALFRED DAY.

Louisa Thorn.
Edward Graham,
Commissioner, &c.
Mary Thorn.
N. Clay,
Commissioner, &c.

Oath—Administration Will.

[Name and Address of Solicitor.]

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division.

(Principal Probate Registry.)

In the goods of Henry Thorn, deceased.

[“I,” or “We.”]

Insert the names, residences, and titles, professions, or additions of the parties applying for administration with the will annexed.

In case of affirmation, insert form of affirmation prescribed by act of parliament.

Here state the manner in which all persons having a prior right are cleared off.

Here state the capacity in which the parties apply for administration with the will annexed.

I, Louisa Thorn, of Moreton Street, in the city of Manchester, widow, make oath and say, that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of the said Henry Thorn, late of Moreton Street aforesaid, stationer, deceased; that George Poole the sole executor, and the universal legatee in trust named in the said will, has duly renounced the probate and execution of the said will; that I am the relict of the said deceased, and the residuary legatee for life named in the said will; that I will well and faithfully administer the personal estate and effects of the said deceased, by paying his just debts, and the legacies contained in his will, and distributing the residue of his estate according to law so far as the same shall extend and the law bind me; that I will exhibit a true and perfect inventory of all and singular the said personal estate and effects, and render a just and true account thereof whenever required by law so to do; that the testator died at Moreton Street aforesaid on the 6th day of March, 1891, and that the whole of the personal estate and effects of the said testator amounts in value to the sum of one thousand pounds, and no more, to the best of my knowledge, information, and belief.

Sworn at the city of Manchester this 18th day of
March, 1891, Before me, EDWARD GRAHAM, }

LOUISA THORN.

A Commissioner to administer Oaths in the
Supreme Court of Judicature.

Renunciation.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division.

(Probate).

The Principal Registry.

In the goods of Henry Thorn, deceased.

Whereas Henry Thorn, late of Moreton Street, in the city of Manchester, deceased, died on the sixth day of March, 1891, at Moreton Street aforesaid, having made and duly executed his last will and testament bearing date the 7th day of June, 1890, and thereof appointed George Poole sole executor and universal legatee in trust:

Now I, the said George Poole, do hereby declare that I have not intermeddled in the personal estate and effects of the said deceased, and will not hereafter intermeddle therein with intent to defraud creditors; and I do hereby renounce all my right and title to the probate and execution of the said will.

If there be codicils,
their dates should also
be stated.

*One disinterested witness
sufficient.*

Signed by the said George Poole, this 18th day
of March, 1891, in the presence of }

GEORGE POOLE.

ROBERT LEE.

Bond.

[Gentleman—not sufficient description of surety.]

[Clerks to solicitors extracting the grant objected to as sureties.]

KNOW all men by these presents, That we, Louisa Thorn, of Moreton Street, in the city of Manchester, widow: John Smith of Thomas Street, in the same city, merchant, and John Thomas, of Smith Street, in the same city, banker, are jointly and severally bound unto the Right Honorable Sir James Hannen, knight, the president of the Probate, Divorce, and Admiralty Division of her Majesty's High Court of Justice, in the sum of 2,000*l.*, of good and lawful money of Great Britain, to be paid to the said Sir James Hannen, or to the judge of the Probate Division of the said Court for the time being, for which payment well and truly to be made we bind ourselves and every of us, for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the 18th day of March, in the year of our Lord, 1891.

The condition of this obligation is such, that if the above-named Louisa Thorn, widow, the relict and the residuary legatee for life named in the will of Henry Thorn, late of Moreton Street, in the said city of Manchester, and the intended administrator of all and singular the personal estate of the said deceased, who died on the 6th day of March, 1891, do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the personal estate of the said deceased, which have or shall come to her hands, possession, or knowledge, and the same so made do exhibit, or cause to be exhibited, into the Principal Registry of the Probate Division of her Majesty's High Court of Justice, whenever required by law so to do: And the same personal estate do well and truly administer (that is to say) do pay all and singular the debts of the said deceased which he did owe at his decease, and then do pay the legacies contained in the said will annexed to the said letters of administration so to her committed, as far as his personal estate will thereto extend, and the law charge her: And further do make, or cause to be made, a true and just account of her said administration, when she shall be thereunto lawfully required, and all the rest and residue of the said personal estate shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-)	LOUISA THORN (L.S.).
named Louisa Thorn, John Smith, and)	JOHN SMITH (L.S.).
John Thomas, in the presence of)	JOHN THOMAS (L.S.).

EDWARD GRAHAM,

A Commissioner to administer Oaths in the
Supreme Court of Judicature.

Administration with the Will annexed.

THE PRINCIPAL REGISTRY.

Extracted by Frederick Tryon, of Gray's Inn Square, W.C., Solicitor.

The affidavit bears a stamp of £ .

IN HER MAJESTY'S HIGH COURT OF JUSTICE.

Be it known that Henry Thorn, late of Moreton Street, in the city of Manchester, stationer, deceased, who died on the 6th day of March, 1891, at Moreton Street aforesaid, made and duly executed his last will and testament, and did therein name George Poole sole executor and universal legatee in trust, who has duly renounced the probate and execution of the said will.

And be it further known, that at the date hereunder written, letters of administration with the will (a copy whereof is hereunto annexed) of the personal estate of the said Henry Thorn were granted by her Majesty's High Court of Justice at the principal Probate Registry to Louisa Thorn, widow, the relict of the said deceased, and the residuary legatee for life named in the said will, she having been first sworn well and faithfully to administer the same.

And it is hereby certified that an affidavit in verification of the account of the said estate has been duly stamped, wherein it is shown that the gross value of the said estate amounts to 1,000*l*. and no more.

Dated the 2nd day of June, 1891.

A. B., Registrar.

Act on Will.

On the 2nd day of June, 1891, administration with the will annexed of the effects of the testator were granted to Louisa Thorn, widow, the relict.

Fees.

THE HIGH COURT OF JUSTICE.
Probate, Divorce and Admiralty Division.
(Administration with Will.)

PRINCIPAL REGISTRY.

Henry Thorn, deceased.

WILL.

Sets, Receiver and Examiner.

	£	s.	d.
Receipt	0	1	0
Registering and Collating Will (3 folios—92 words)	0	4	6
Filing Fees:—			
Renunciation	0	2	6
Administration Will under £1,000	1	13	0
Search	0	0	6
Certificate of Registrar	0	2	6

Bill of Costs.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Probate.)

In the goods of Henry Thorn, deceased.

1891.		£	s.	d.
May 20.	Instructions for letters of administration with the will annexed	0	6	8
	Perusing and considering will, 4d. a folio of 72 words (3 folios)	0	1	0
	Drawing and engrossing oath of administratrix and attending on her being sworn thereto	0	10	0
	Paid Commissioner	0	1	6
	Drawing and engrossing affidavit for the Inland Revenue and attending on the administratrix being sworn thereto	0	10	0
	Paid Commissioner	0	1	6
	" " marking will	0	1	0
	Instructions for instrument of renunciation of executor	0	6	8
	Drawing same and fair copy, 1s. 4d. per folio (3 folios)	0	4	0
	Attending execution thereof	0	6	8
	Paid filing same	0	2	6
	Instructions for the bond	0	6	8
	Drawing and engrossing same and attending its execution	0	10	0
	Paid Commissioner for attesting bond	0	1	6
	Attending and obtaining stamp on same	0	6	8
	Paid stamp	0	5	0
	Registering, engrossing and collating the will (3 folios) ... 3s. each	0	9	0
	Attending at Stamp Office paying the duty on the grant, and pro- curing same duly stamped	0	13	4
	Paid for form of grant	0	0	6
	Attending at Registry with the papers for the grant, lodging same, and obtaining receipt	0	6	8
	Stamp on receipt	0	1	0
	Search stamp (6d. a year from date of death)	0	1	0
	Paid stamp duty	22	0	0
	Letters of administration with will under seal, Court fees	1	13	0
	Extracting	0	6	8
	Letters, messengers, &c.	0	2	0
		£29	14	6

Oath for Administrators with the Will, de bonis non.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Probate Registry.)

In the Goods of Henry Thorn, deceased.

[“I,” or “We.”]
Insert the names, resi-
dences, and titles, pro-
fessions, or additions of
the parties applying for
administration with the
will annexed.

* [Or “do solemnly,
sincerely, and truly de-

I, Mary Thorn, of 2, West Mansions, Bognor, in the
county of Sussex, spinster, make oath and say* that the
said Henry Thorn, late of† Moreton Street, in the City of
Manchester, stationer, made and executed his last will
and testament, and did therein name George Poole sole
executor and universal legatee in trust, who duly re-

clare and affirm," that
&c.)

If a codicil or codicils,
insert "with one, two,
&c. codicils annexed,"
as the case may be.

Insert name, residence,
and title, profession, busi-
ness, or addition of
deceased.

Here recite appoint-
ment of executor, &c.

Here recite former
grant or grants (if any),
and state the manner in
which all persons having
a prior right are cleared
off.

+ Or "formerly of,"
&c., "but late of," &c.

Here state the capacity
in which the parties ap-
ply for administration
with the will annexed.

nounced the probate and execution of the said will, and that in the month of June, 1891, administration with the said will annexed was granted at the principal registry of the said Probate Division to Louisa Thorn, widow, the relict of the said deceased, the residuary legatee for life named in the said will, who for some time intermeddled in the personal estate of said deceased, and died on the 10th day of November, 1891, leaving part thereof unadministered; that I believe the paper writing hereto annexed, and marked by me to contain the true and original last will and testament of the said Henry Thorn, deceased; that I am one of the natural and lawful children of the said deceased, and as such, one of the residuary legatees substituted in the said will; that I will well and faithfully administer the personal estate and effects of the said deceased left unadministered as aforesaid by paying his just debts, and the legacies contained in his will, and distributing the residue of his estate according to law so far as the same shall extend and the law bind me; that I will exhibit a true and perfect inventory of all and singular the said personal estate and effects, and render a just and true account thereof whenever required by law so to do; that the testator died at Moreton Street aforesaid, on the 6th day of March, 1891, and that the whole of the unadministered personal estate and effects of the said deceased amounts in value to the sum of one thousand pounds and no more to the best of my knowledge, information and belief.

Sworn at Bognor aforesaid, this 2nd day of
December, 1891,

Before me,

SIDNEY MAY,

A Commissioner to administer Oaths in the
Supreme Court of Judicature.

MARY THORN.

The affidavit for the Inland Revenue is in the same terms, varied according to the oath, as the affidavit for the original grant.

The engrossment of the will to be annexed to the Grant of Administration with the Will annexed de bonis non, and also the Free Mark or Duty Paid Stamp, will be obtained as explained for Double Probate, and the Papers left as therein directed with the "Receivers of Papers for Examination," &c., *ante*, p. 284.

The Record Notation in Former Will, &c., are also similar to "Double Probate."

Administration Will, de bonis non—Bond.

The stamp duty is 5s., where bond exceeds 100l.

Under 100l. no duty payable.

[NOTE.—“Gentleman,” not sufficient description. Clerks to solicitors extracting the grant objected to as sureties.]

“A. B. (or K. B., wife of the above-named A. B.,) the (here state the character in which the party takes the grant), of L. J., late of gentleman, a widower” (or as the case may be).

“Left unadministered by,” &c. (or as the case may be).

KNOW ALL MEN by these presents that we, Mary Thorn, of 2, West Mansions, Bognor, in the county of Sussex, spinster, Alexander Stone, of Knightsbridge, in the county of Middlesex, printer, and George Maple, of Putney, in the county of Surrey, upholsterer, are jointly and severally bound unto the Right Honorable the President of the Probate, Divorce and Admiralty Division of her Majesty's High Court of Justice, in the sum of two thousand pounds, of good and lawful money of Great Britain, to be paid to the said Right Honorable the president of the said Division for the time being, for which payment well and truly to be made we bind ourselves and every of us, for the whole, our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated the 3rd day of December, in the year of our Lord one thousand eight hundred and ninety-one.

The condition of this obligation is such, that if Mary Thorn, one of the natural and lawful children of the said deceased, and as such, one of the residuary legatees substituted in the last will and testament of Henry Thorn, late of Moreton Street, in the city of Manchester, stationer, deceased, who died on the 6th day of March, 1891, and the intended administratrix (with the said will annexed) of the personal estate and effects of the said deceased, left unadministered by Louisa Thorn, widow, deceased, whilst living the relict of the said deceased, and the residuary legatee for life named in the said will, do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of all and singular the personal estate and effects of the said deceased left unadministered which have or shall come to her hands, possession or knowledge, and the same so made do exhibit or cause to be exhibited, into the principal registry of the said Division, whenever required by law so to do: And the same personal estate and effects left unadministered do well and truly administer (that is to say) do pay the debts of the said deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration so to her committed, as far as his personal estate and effects left unadministered will thereto extend, and the law charge her: And further do make, or cause to be made, a just and true account of her said administration, when she shall be thereunto lawfully required, and all the rest and residue of the said personal estate and effects, left unadministered, shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void, and of none effect, or else to remain in full force and virtue.

Signed, sealed and delivered by the within-named	}	MARY THORN.	(L.S.)
Mary Thorn, Alexander Stone and George Maple,		ALEXANDER STONE.	(L.S.)
in the presence of		GEORGE MAPLE.	(L.S.)
EDWARD RICHE.			

CHAPTER XX.

ADMINISTRATION, HOW OBTAINED.

P. R., N.-C. By Rule 1, application for grants of letters of administration may be made at the Principal Registry in all cases.
Rule 1.

Therefore, as in the case of a grant of probate, no one need apply to a District Registry in the first instance unless he so please.

Rules 2 and 3. Rules 2 and 3 apply to grants of letters of administration as well as to grants of probate.

Time for issuing administration. By Rule 44, no letters of administration are to issue for fourteen days after the death of the deceased, except by the direction of the Judge or by order of two of the Registrars.

Reason of delay. By Rule 45, where administration is applied for after three years from the death of the deceased, the reason of the delay must be certified to the Registrars, who may require such proof of the alleged cause of delay as they may see fit.

Rule 46. By Rule 46, all letters of administration issued from the Principal Registry are to be filled up there.

Identity of deceased. By Rule 48, the Registrars may, at their discretion, require proof in addition to the oath of the administrator, of the identity of the deceased and of the party applying for the grant (*x*).

Next of kin. By Rule 28, where administration is applied for by one or some of the next of kin only, there being other next of kin equally entitled, the Registrars may require proof by affidavit or statutory declaration that due notice has been given to such other next of kin.

(*x*) Upon an application for administration to the estate of a child, the Court allowed the birth and death of the child to be proved by evidence of declarations by its de-

ceased mother. *In the goods of Thompson*, 12 P. D. & A. 100; 56 L. J., P. D. & A. 46; 57 L. T. 373; 35 W. R. 384.

Errors so frequently occur in describing parties as the "next of kin" or "one of the next of kin" of the deceased, who possess no title to such description, that it cannot be too clearly understood that, for administration purposes, the term "next of kin" applies only to the nearest blood relations living at the date of the death of the deceased. The husband and the widow are not, as such, "next of kin" of the deceased.

Who are next of kin.

By Rule 29, no limited grants of administration are to issue until every person entitled to the general grant has consented or renounced, or been cited and failed to appear.

Probate Rules.
P. R., N.-C.
R. 29.

And by Rule 30, no person entitled to a general grant of administration will be permitted to take a limited grant.

Limited grant.
General grant.
R. 30.

By Rule 50, no person renouncing letters of administration to the personal estate of a deceased person in one character is to be allowed to take representation to the same deceased in another character.

Renunciation.
R. 50.

These rules, however, contain the words "except under the direction of the Judge." Any application, therefore, to vary any of these provisions must be made before the Court on motion.

By Rule 31, whenever an administrator is appointed under the Court of Probate Act, 1857, sect. 73, the nature of his appointment "is to be made plainly to appear in the oath of the administrator in the letters of administration and in the administration bond."

R. 31.
C. P. Act,
1857, s. 73.

By Rule 32, in the case of a person residing out of England, administration may be granted to his attorney acting under a power of attorney.

Administrators abroad.
R. 32.

Executors, or other persons entitled to represent the deceased, being abroad may take the grant themselves; the necessary papers being sent to them to depose to; or they may authorize some one as their attorney to take a grant for their use and benefit until they or either of them (in case of executors) shall apply; and in case of administrators until they shall apply.

Executors and administrators abroad.

By Rule 33, grants of administration may be made to the guardians of minors and infants, and elections by minors of their next of kin (or next friend) are required;

Guardians of minors and infants under 7.
R. 33.

but proxies accepting such guardianships and assignments of guardians are dispensed with.

The mother being the lawful guardian by "Guardian Act" need not be elected.

Probate
Rules.
P. R., N.-C.
R. 34.

By Rule 34, where an infant has neither a testamentary guardian nor a guardian appointed by the Chancery Division, a guardian must be assigned by order of the Judge or one of the Registrars.

The Registrar's order is to be founded on an affidavit showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right, and is a consenting party to the order, or has been cited, and that the proposed guardian is ready to undertake the guardianship.

Guardians of
minors to act
for infants.
R. 35.

Rule 35 empowers guardians elected by minors (in cases where there are both minors and infants) to act also for the infants without the above order when the object in view is to take a grant.

On the other hand, when the object is to renounce a grant a guardian must be specially assigned to the infants by the order of a Judge or a Registrar.

Guardian to
infant.

The party desiring to be appointed guardian to the infant files an affidavit.

His solicitors then prepare an order which is signed by the Registrar.

Fees payable: filing affidavit, 2s.; Registrar's Order, 2s. 6d.

R. 36.

By Rule 36, "In all cases where grants of administration are to be made for the use and benefit of minors or infants the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Courts, or are the testamentary guardians of the minors or infants."

Oath of admin-
istrators.
R. 37.

By Rule 37, the oath of administrators is to be so worded as to clear off all persons having a prior right to

the grant, and a grant is to show on the face of it how the prior interests have been cleared off. And the oath is to set forth that the applicant is the only next of kin, or one of the next of kin, as the case may be. See *post*, p. 306.

Probate
Rules.
P. R., N.-C.

In all administrations of a special character the recitals in the oath and in the grant must be framed in accordance with the facts of the case.

By Rule 47, the usual oath of administrators is to be subscribed and sworn by them as an affidavit, and then filed in the Registry. R. 47.

A person proposing to take a grant of administration will be sworn to his oath and affidavit in the same manner as an executor.

No fee is required for filing an administration bond.

The oath, the affidavit for the Inland Revenue, with the "Duty Stamp" upon it, and the administration bond and fees, are taken to the Receiver of Papers who gives a receipt for them in the same manner as the receiver of wills in the case of a will.

The remaining steps requisite for obtaining a grant of administration are, *mutatis mutandis*, the same as those requisite for obtaining a grant of probate.

Rule 72, as to alterations in grants, and Rules 73 and 74, as to Irish grants, and grants for the United Kingdom generally, apply equally to grants of administration as to probates.

Alteration of
grant.
Rs. 72, 73, 74.

By Rule 75, "In all cases where application is made for letters of administration (either with or without a will annexed) of the goods of a bastard dying a bachelor or a spinster, or a widower or widow without issue, or of a person dying without known relation, notice of such application is to be given to her Majesty's procurator-general (or in case the deceased died domiciled within the duchy of Lancaster, to the solicitor for the duchy in London), in order that he may determine whether he will interfere on the part of the crown; and no grant is to be issued until

No known
relation.
R. 75.

Probate
Rules.
P. R., N.-C.
R. 76.

the officer of the crown has signified the course which he thinks proper to take."

By Rule 76, in cases of persons dying intestate without any known relations, a citation must be issued against the next of kin (if any) and all other persons having or pretending to have any interest in the estate (*g*); and this citation must be served on the Queen's Proctor, or upon the solicitor of the duchy of Lancaster, as the case may be; and the letter from the Queen's Proctor, in answer to the citation, must be filed.

Bastards.

Where a bastard intestate died within the duchy of Cornwall, the Court granted letters of administration of his estate to the solicitor of the duchy for the use and benefit of H.R.H. the Prince of Wales, as Duke of Cornwall. The grant was, however, made without prejudice to the rights of the crown. Nevertheless, it may be as well in future to serve the citation on the solicitor for the duchy of Cornwall in cases of bastards dying within its limits (*h*).

Administra-
tion *cessate*, or
de bonis non.

Where a grant of letters of administration *cessate* or *de bonis non* is required, the practice is the same as in a case of a grant of administration *cessate*, or *de bonis non* with the will annexed, and the oath can be settled by the Clerk of the Seat. Fees same as in special grants.

FURTHER SECURITY.

In cases where a notation of further security is required, the affidavit, bond and letters of administration, either with or without a will annexed, which are to be noted,

(*g*) *Clayton v. Browne*, 28 L. J., P. & M. 124. See *post*.

(*h*) *In the goods of Canning*, L. R., 5 P. D. 114; 41 L. T. 737; 28 W. R. 278. On motion for grant of letters of administration of an intestate's effects to H.R.H. the

Prince of Wales as Duke of Cornwall, it is not necessary, if the effects are sufficiently set forth in the warrant, that they should be verified by affidavit. *In the goods of Griffith*, 9 P. D. 63; 53 L. J., P. 35; 32 W. R. 525; 48 J. P. 312.

must be taken to the Notation Department, to whom the proper fees must be paid, but no receipt is given for the papers.

If the further security be in respect of a limited or special grant, the bond must be prepared according to the practice already laid down for limited or special grants.

If a certificate of delay was required in the application for the original grant, a fresh certificate will be required.

No fee is required for filing the bond, if it be in respect of an administration *de bonis non*, and there is no difference in this respect whether there is a will or not.

The following are specimens of grants of letters of administration, and of administration *de bonis non* :—

Oath for Administrators.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Principal Probate Registry.)

In the goods of Eliza Mills, deceased.

Insert the names, residences, and titles, or additions of the deponents.

In case of affirmation insert form of affirmation prescribed by act of parliament.

Here state the names of those who have a prior right, and show how they are cleared off; and also state the kindred, or right of the proposed administrator.

*Extracted by F. Tryon,
Gray's Inn Square, Solicitor.*

I, Jane Willis (wife of William Willis, tailor) of Epsom, in the county of Surrey, make oath and say, that Eliza Mills, late of Ipswich, in the county of Suffolk, deceased, died intestate, a widow, and that I am the natural and lawful daughter and one of the next of kin of the said deceased; that I will faithfully administer the personal estate and effects of the said deceased by paying her just debts, and distributing the residue of her said estate and effects according to law so far as the said estate and effects shall extend and the law bind me; that I will exhibit a true and perfect inventory of all and singular the said estate and effects, and render a just and true account thereof whenever required by law so to do; that the said deceased died at Ipswich aforesaid on the first day of February, 1891, and that the whole of the personal estate and effects of the said deceased amounts in value to the sum of five hundred pounds and no more, to the best of my knowledge, information and belief.

Sworn at 14, Great George Street, in the city of
Westminster, this first day of March, 1892,
Before me,

JANE WILLIS.

JOHN SIMS,

A Commissioner to administer Oaths in the
Supreme Court of Judicature.

Administration Bond.

The stamp duty is 5s. where estate exceeds 100*l*.

Under 100*l*. no duty payable.

[NOTE.—“*Gentleman*” is not a sufficient description.

Clerks to the solicitor extracting the grant are objected to as sureties.]

KNOW ALL MEN by these presents, that we, William Willis, of Epsom, in the county of Surrey, tailor, George Kemp, of 13, George Street, Brixton, in the county of Surrey, butcher, and Charles Nugent, 23, Knightsbridge, in the county of Middlesex, auctioneer, are jointly and severally bound unto the Right Honorable the President of the Probate, Divorce, and Admiralty Division of her Majesty’s High Court of Justice, in the sum of one thousand pounds of good and lawful money of Great Britain, to be paid to the said or to the President of the said division for the time being, for which payment well and truly to be made we bind ourselves and every of us, for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the first day of March in the year of our Lord one thousand eight hundred and ninety-two.

“the above named A. B. (or K. B., the wife of the above named A. B.), the natural and lawful daughter, and only next of kin of J. J., formerly of —, but late of —, gentleman, a widower” (or as the case may be).

Left unadministered by, &c. (or as the case may be).

Left unadministered (if so).

Left unadministered (if so).

Left unadministered (if so).

The condition of this obligation is such, that if Jane Willis (wife of the above-named William Willis) the natural and lawful daughter and one of the next of kin of Eliza Mills, late of Ipswich, in the county of Suffolk, a widow, deceased, who died on the first day of February, 1891, and the intended administratrix of all and singular the personal estate and effects of the said deceased, do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to her hands, possession, or knowledge, or into the hands and possession of any other person for her, and the same so made do exhibit, or cause to be exhibited, into the Principal Registry of the Probate Division of her Majesty’s High Court of Justice, whenever required by law so to do: And the same personal estate and effects, and all other the personal estate and effects of the said deceased, at the time of her death, which at any time after shall come to the hands or possession of the said Jane Willis, or into the hands or possession of any other person or persons for her, do well and truly administer according to law (that is to say) do pay the debts which she did owe at her decease: And further do make, or cause to be made, a just and true account of her said administration, whenever required by law so to do, and all the rest and residue of the said personal estate and effects, do deliver and pay unto such person or persons as shall be entitled thereto, under the act of parliament intituled, “An Act for the better settling of Intestates Estates.” And if it shall hereafter appear that any last will and testament was

made by the said deceased, and the executor or executors or other persons therein named do exhibit the same into the Probate Division of the said Court, making request to have it allowed and approved accordingly, if the said Jane Willis being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court, then this obligation to be void, and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within
 named William Willis, George Kemp, and
 Charles Nugent, in the presence of
 JOHN SIMS,
 A Commissioner, &c.

WILLIAM WILLIS. (L.S.)
 GEORGE KEMP. (L.S.)
 CHARLES NUGENT. (L.S.)

Administration.

THE PRINCIPAL REGISTRY.

IN HER MAJESTY'S HIGH COURT OF JUSTICE.

Be it known, that at the date hereunder written, letters of administration of the personal estate of Eliza Mills, late of Ipswich, in the county of Suffolk, deceased, who died on the 1st day of February, 1891, at Ipswich aforesaid, a widow, intestate, were granted by her Majesty's High Court of Justice at the Principal Probate Registry thereof to Jane Willis (wife of William Willis), the natural and lawful daughter, and one of the next of kin of the said intestate, she having been first sworn well and faithfully to administer the same: And it is hereby certified that an affidavit in verification of the account of the said estate has been delivered duly stamped, wherein it is shown that the gross value of the said estate amounts to 600*l.* and no more (e).

Dated the 7th day of March, 1892.

A. B.,
 Registrar.

Fees.

THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Probate.)

PRINCIPAL REGISTRY.

ADMINISTRATION.

Eliza Mills, deceased.

	£	s.	d.
Receipt	0	1	0
Administration, including Special, Limited, de bonis non, Duplicate or Cessate Grant, under Seal under £500	1	2	6
Search, one year	0	0	6
Certificate of Registrar	0	2	6

Oath delivered.

£1 6 6

(e) The words "*duly stamped*" are omitted when no stamp duty is payable. The fee for the certificate is 2*s.* 6*d.*

Extracted by F. Tryon, Gray's Inn Square,
 Solicitor.

The affidavit bears a stamp of £

<i>Bill of Costs.</i>		£	s.	d.
Instructions for administration		0	6	8
Drawing oath of administratrix, and attending her on being sworn, and on her execution of the bond		0	6	8
Paid commissioner—Oath		0	1	6
Bond		0	1	6
Drawing affidavit for Inland Revenue, and attending administratrix on her being sworn				
Paid commissioner		0	1	6
Instructions for bond		0	6	8
Drawing and engrossing same		0	6	8
Paid stamp on bond		0	5	0
Attending sureties on execution of bond		0	6	8
Paid commissioner—1s. 6d. each surety		0	3	0
Paid stamp duty				
Stamp on receipt		0	1	0
Paid for form of grant		0	0	6
Search fee—6d. for every year after date of death				
Letters of administration under seal				
Extracting		0	6	8
Clerks		0	2	0
Paid Court fees				
Letters, messengers, &c.		0	5	0
		£3	1	0

The following is the Form of Oath for a Grant of Administration de bonis non to a nephew of intestate, a party in distribution whose father, a brother of the intestate, died in her lifetime:—

Oath of Administration de bonis non.

IN THE HIGH COURT OF JUSTICE.

Probate Division.

(The Principal Registry.)

In the goods of Louisa Mills, deceased.

Insert the names, residences, and titles or professions of the parties applying for administration.

If the intended administrator objects to make oath, he must make affirmation in the precise form of words prescribed by the act of parliament applicable to his particular sect.

Here state the manner in which all persons having a prior right are cleared off.

Here recite former grant or grants of administration (if any), and also the capacity in which the parties now apply for administration.

I, Harry Mills, of 13, Villa Road, Oldham, in the county of Lancaster, make oath and say, that Louisa Mills, late of Ipswich, in the county of Suffolk, deceased, died intestate, a widow, without child or parent, and that in the month of , letters of administration of the personal estate of the said intestate were granted at the said principal registry to John Mills, the natural and lawful brother and only next of kin of the said intestate, who for some time intermeddled in the said personal estate, and died on , leaving part thereof unadministered. That I am the lawful nephew and one of the persons entitled in distribution to the personal estate of the said intestate, being the natural and lawful son of Philip Mills, deceased, whilst living the natural and lawful brother of the said deceased, who died on the 1st day of January, 1880, and that I will faithfully administer the personal estate and effects of the said deceased, left unadministered as aforesaid, by paying her just debts, and distributing the residue of her estate

Insert place of death,
or set forth the reason
why the same cannot be
furnished.

according to law so far as the same shall extend and the law bind me; that I will exhibit a true and perfect inventory of all and singular the said unadministered estate and effects, and render a just and true account thereof whenever required by law so to do; that the said deceased died at Ipswich, aforesaid, on the 1st day of February, 1891, and that the whole of the personal estate and effects of the said deceased left unadministered as aforesaid amounts in value to the sum of five hundred pounds, and no more, to the best of his knowledge, information, and belief.

Sworn at the city of Manchester, }
this 1st day of May, 1892, }
Before me, }

HARRY MILLS.

GEORGE TRITTLE,
Commissioner, &c.

ADMINISTRATION OATHS (e).

[For Table of Distribution of Intestate's Estates, showing the various interests, see *ante*, pp. 231, 232.]

In preparing the *Oath* for Administration, the following Clearing off
prior in-
terests.

(e) A. P. died in 1887, intestate, without child or parent, leaving her surviving J. S., her natural and lawful brother, and one of her next of kin. The said intestate, who was about sixty-three years of age at the time of her death, was married in 1860, and her husband, a sailor, of about the same age as herself, shortly afterwards left her, and at the date of this motion it was upwards of twenty years since he was last heard of. The said intestate left personalty amounting to 1,011*l.* 15*s.* 2*d.*, the result of her personal earnings and savings. J. S., now resident in America, appointed as his attorney one J., a solicitor, and the latter applied for administration. The Court was now moved on his behalf to modify the wording

of the oath, and that he might have leave to swear that "he believed that the said A. P. was a widow at the time of her death." The Court declined to follow the case of *In goods of Reed* (29 L. T. 932), and refused the application, stating that the practice in such cases was either to swear the oath in the regular form, and so to get the grant, or, in the alternative, to cite the next of kin. Upon the authority of that case alone, the Court felt disinclined to depart from the practice. Upon appeal, held, that this case was distinguishable from *In goods of Reed* (29 L. T. 932), and that, upon the facts disclosed by the affidavits, the appeal must be dismissed. (*In the goods of Pridham*, 61 L. T. 302, C. A.)

suggestions as to clearing off prior interests may be of assistance.

When Administration is taken :

- (1) *by the lawful husband—*
it must be stated that the deceased died intestate ;
- (2) *by the lawful widow and relict—*
state deceased died intestate ;
- (3) *by the natural and lawful father and next of kin—*
deceased died intestate a bachelor or spinster,—or
a widower or widow without child ;
- (4) *by the natural and lawful mother and sole next of kin—*
deceased died intestate a bachelor or spinster without
father,—or widower or widow without child or
father ;
- (5) *by the natural and lawful child and one of the (or only)
next of kin—*
deceased died intestate a widower or widow, *or that*
the lawful widow and relict has duly renounced
the letters of administration of the personal
estate of the said deceased, *or that* the lawful
widow and relict of the said deceased died
without taking letters of administration, *or*
has been duly cited and not appeared, *or* is
a lunatic or person of unsound mind ;
- (6) *by the lawful grandson and one of the (or only) next of
kin—*
deceased died intestate a widower or widow without
child ; or clear off widow as in No. 5.
- (7) *by the lawful grandson and one of the persons entitled in
distribution—*
deceased died intestate, a widower or widow, C. B.,
the natural and lawful son and only next of kin

of the said deceased, having survived the said deceased, and died without having taken letters of administration of his (deceased's) estate; and that applicant is the lawful grandson, &c., being the natural and lawful son of A. B. the natural and lawful son of the said deceased, who died on the — day of —, 18—, in his (deceased's) lifetime;

- (8) *by the natural and lawful brother or sister and one of the (or only) next of kin—*

or by the natural and lawful brother or sister by the half-blood and one of the (or only) next of kin—

deceased died intestate a bachelor or spinster without parent,—or widower or widow without child or parent,—Or clear off widow, as in No. 5;

- (9) *by the lawful grandfather or grandmother, and one of the (or only) next of kin—*

deceased died intestate a bachelor or spinster without father or mother, brother or sister,—or widower or widow, without child or father, or mother, &c.;

- (10) *by the lawful nephew or niece and one of the (or only) next of kin—*

deceased died intestate a bachelor or spinster without parent, brother or sister,—or widower or widow without child or parent, &c.;

- (11) *by the lawful nephew or niece and one of the persons entitled in distribution—*

deceased died intestate a bachelor or spinster without parent,—or widower or widow without child or parent—the natural and lawful brother and only next of kin having, &c., as in No. 7; and that applicant is the lawful nephew, &c., being the natural lawful son of —, whilst

living the natural and lawful brother of the said deceased who died on the — day of —, in his (deceased's) lifetime;

- (12) *by the lawful uncle or aunt and one of the (or only) next of kin—*

deceased died intestate a bachelor or spinster without parent, brother, or sister,—or widower or widow without child, &c.;

- (13) *by the lawful cousin-german and one of the (or only) next of kin—*

deceased died intestate a bachelor or spinster without parent, brother or sister, uncle or aunt, nephew or niece,—or widower or widow without child, &c.;

- (14) *by the lawful cousin-german, once removed, and one of the (or only) next of kin—*

deceased died intestate a bachelor or spinster without parent, brother or sister, uncle or aunt, nephew or niece, or cousin-german,—or widower or widow without child, &c.;

- (15) *by the lawful second cousin or lawful first cousin twice removed and one of the (or only) next of kin—*

deceased died intestate a bachelor or spinster without parent, brother or sister, uncle or aunt, nephew or niece, cousin-german, or cousin-german once removed,—or widower or widow without child, &c.;

- (16) *by the lawful first cousin thrice removed or the lawful second cousin once removed.*

- (17) *by the lawful first cousin four times removed or the lawful second cousin twice removed or the lawful third cousins.*

- (18) *by the lawful first cousin five times removed, the lawful second cousin three times removed, or the lawful third cousin once removed.*

* * * When applicant is of class 18, clear off classes 16 and 17 in addition to class 15.

The Affidavit for the Inland Revenue is similar to that for the first Grant.

The Duty-paid Stamp for the De bonis Grant is procured in the manner prescribed for Double Probate, *ante*, p. 284.

The Notations and Record are also similar.

Fees.

THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division. (Probate.)

PRINCIPAL REGISTRY.

ADMINISTRATION DE BO.

Louisa Mills, deceased.

	£	s.	d.
Receipt	0	1	0
Filing Fees :—			
Affidavit for Inland Revenue	0	0	0
Renunciation	0	0	0
Proxy of Election of Guardian	0	0	0
Declaration of Effects	0	0	0
Registrar's Order	0	0	0
Other Affidavits or Certificates	0	0	0
Administration, including Special, Limited, de bonis non, Duplicate or Cessate Grant, under Seal under 500 <i>l</i>	1	2	6
Search	0	0	0
Notation	0	2	6
Certificate of Registrar	0	2	6
Oath delivered.	£1	8	6

BOND.

By sect. 81, "Every person, to whom any grant of administration shall be committed, shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate, or (in the case of a grant from the District Registry) the district registrar, shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct; provided that it shall not be necessary for the solicitor for the affairs of the treasury, or the solicitor of the duchy of Lancaster, applying for or obtaining administration to the use or benefit of her Majesty, to give any such bond as aforesaid."

By sect. 82, "Such bond shall be in a penalty of double Penalty to
bond.

the amount under which the estate and effects of the deceased shall be sworn, unless the Court or District Registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the Court or District Registrar so to do, and the Court or District Registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or District Registrar shall think reasonable."

Bond cannot
be dispensed
with.

Bond, how
attested.

The Court has no power under any circumstances to dispense with an administration bond (*f*).

By Rule 38, administration bonds are to be attested by an officer of the principal registry or by any person authorized to administer oaths under the Probate Acts, 1857, 1858, which must be now understood to mean any person authorized to administer oaths in the Supreme Court, but in no case are they to be attested by the solicitor or agent of the party who executes them.

The signatures of administrators to such bonds, if not taken in the principal registry, must be attested by the person administering the oath.

An administrator who is sworn in London may execute the bond either before the Clerk of the Seat in whose province the initial letter of the name of the deceased falls, or before the same person before whom he swears his oath and affidavit.

Execution of
bond by
sureties.

The sureties may execute the bond before any person qualified to administer oaths, whether he be the same before whom it was executed by the administrator or not.

The amount of stamp on administration bond is 5*s.* in all cases when the amount of effects is over 100*l.* Fees: execution, 1*s.* 6*d.* the first attestation, and 1*s.* for any subsequent one.

Number of
sureties.

Rule 39 requires two sureties to the administration bond in all cases of limited or special administration (except where the husband or his representative is the administrator, or

where the estate is sworn under fifty pounds, in which case one surety will suffice), and the bond is to be given in double the amount of the property to be dealt with by the administrator by means of the grant, and the alleged value of such property is to be verified by affidavit if required. *This has been held to apply also to ordinary administrations.*

By Rule 40, the bond is in all cases of limited or special administrations to be prepared in the registry by the Clerk of the Seat, and the Registrars are to take care (as far as possible) that the sureties are responsible persons. Fee, 2s. per folio. Limited or special.

So much of Rule 39 as requires the bond in these cases to be given in double the amount of the property, is not considered to be applicable either to the case of an estate, which, being in settlement, is sworn under a nominal amount, or to an administration limited to carry on proceedings in the Chancery Division.

If it be desired to reduce the penalty of the usual administration bond, or to dispense with the usual sureties, or to limit the liability of a surety to a particular sum of money, or to be allowed to file more than one bond, application must be made to the Court on motion. Reduced penalty, &c.

By Rule 41, the Registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons; so the sufficiency of sureties described as *labourers, domestic servants, clerks, and persons of like occupations*, may be questioned. Clerks to solicitors extracting the grant are objected to, and "*gentleman*" is not considered to be a sufficient description. *Females*—responsible females, whether married or single—will be accepted as sureties. *Also any guarantee society (g).* Who may be sureties.

The husband of the administratrix may be one of the sureties—if, otherwise, sufficient. Bond of married woman.

If a married woman is tendered as surety, an affidavit must be filed showing that she is possessed of sufficient *separate property* to cover the penalty.

(g) The society's bond must be executed before a commissioner as required by Rule 38. See p. 310.

Execution of.

An administration bond was returned from Australia, executed in the presence of two witnesses and not in the presence of the Commissioner who took the affidavit of the administratrix: the Court allowed the bond to be filed notwithstanding the 38th Rule, P. R., Non-C. (*h*).

C. P. Act,
1857, s. 82.
More than one
bond.

It was held under this section (82), where the effects of an intestate had been sworn under 20,000*l.*, and letters of administration were granted to A., on the execution of the usual administration bond, in a penalty double that sum, and subsequently, by payment to the administratrix of a dividend upon the estate of a bankrupt debtor of the intestate, the value of the effects being increased beyond 20,000*l.*, and it became necessary to re-swear them as under 25,000*l.*, that a fresh bond need not be executed, but that a bond in the penalty of 10,000*l.* would, with that already executed, be sufficient (*i*).

Where G. died a bachelor and intestate, leaving personal estate sworn under 2,000*l.*, his debts amounting to about 44*l.*, the Court, under sect. 82, granted letters of administration to his mother, who was his sole next of kin, on her giving a bond with sureties for double the amount of the debts of the deceased (*k*).

Property in
Ireland.

Where a testator died leaving personal estate in England and personal property in Ireland, and an administration was granted in the Court of Probate in England of the property in England, sworn under 2,000*l.*, with a bond to cover such property, the Court subsequently ordered that on a bond being given in the penal sum of 120,000*l.*, and its being noted on the letters of administration, that the deceased's personal estate in Ireland had since been sworn under 60,000*l.* and the security given accordingly, one of the Registrars should issue a certificate that a bond had been given to the Judge of the Court of

(*h*) *In the goods of Parker*, L. R., L. T. 191.

1 P. & D. 301; 36 L. J., P. & M.
26; 15 L. T. 248; 15 W. R. 262.

(*i*) *In the goods of Weir*, 1 S. &
T. 506; 28 L. J., P. & M. 111; 2

(*k*) *In the goods of Gent*, 1 S. & T.
54; 27 L. J., P. & M. 37; 4 Jur.,
N. S. 341.

Probate to cover the property in Ireland as well as in England (*l*).

Where a lunatic without a committee of estate or person was next of kin and solely entitled in distribution, and administration was granted, under the 73rd section, to her stepmother, sureties were required to justify (*m*). Sureties justify.

Where the deceased's only son and the sole person entitled in distribution was resident in Australia, administration was granted under the 73rd section to his father-in-law on his giving justifying security and being assigned to exhibit an inventory of the goods, chattels, and credits, within one month from the date of the letters of administration (*n*).

Where a grant was made to persons representing three-fourths of the interest, their sureties were ordered to justify to the extent of the other fourth (*o*). Amount to justify.

Where justifying security had been ordered, and it appeared, that though the estate had been sworn under 2,000*l.*, its actual value was only 800*l.*; the Court allowed the sureties to justify for double the amount of the actual value, instead of double the amount under which the estate was sworn (*p*).

Where the beneficial residuary legatees were minors, and the value of the residue was about 8,000*l.*, subject to a mortgage of 3,900*l.*, the Court granted administration, with the will annexed *de bonis non*, to a contingent legatee, and reduced the amount for which the sureties would have had to justify to 1,000*l.* each, it appearing that justifying security to a greater amount could not be given, that the grant was for the interest of the minors, and that their guardians did not oppose (*q*). Reduced penalty, &c

(*l*) *In the goods of Potts*, 2 S. & T. 5; 2 L. T. 255; 6 Jur., N. S. 486; 8 W. R. 454. (*o*) *Iredale v. Ford*, 1 S. & T. 305; 5 Jur., N. S. 474; 7 W. R. 462.

(*m*) *In the goods of Burrell*, 1 S. & T. 64. (*p*) *England v. Wall*, 31 L. J., P. & M. 16.

(*n*) *In the goods of Jones*, 1 S. & T. 13; 27 L. J., P. & M. 17. (*q*) *In the goods of Fraser*, 33 L. J., P. & M. 57; 9 L. T. 845.

Reduced
justification.

Where A. died intestate, leaving personalty sworn under the value of 6,000*l.*, A.'s father, who was his only next of kin, and the only person entitled in distribution, being unable to procure sureties to a bond in a penalty for double the amount of the estate, the Court accepted two sureties in the sum of 1,000*l.* each (*r*).

Reduced
penalty.

A. died intestate, leaving B. his only next of kin, and solely entitled in distribution: his personal estate was of the value of about 55*l.*, and it seemed that he had no debts: B. being unable through poverty to obtain sureties to the amount of 200*l.*, the penalty of the requisite bond, the Court under s. 82 of 20 & 21 Vict. c. 77, reduced the penalty to 60*l.* (*s*).

Who may de-
mand sureties
to justify.

Creditors are entitled to a *constat* of the personal estate, but they have no right to the quantum of security (having no interest in the administration bond), or to require the sureties to justify (*t*).

Sureties to
justify.

Even where the parties beneficially entitled desire a grant to their nominee under the 73rd section, the sureties must justify (*u*).

On renunciation of an executor, the Court refused to grant administration with the will annexed, without justifying securities, to the daughter, the residuary legatee, during the lunacy of the mother, the other executor (*x*).

Sureties dis-
pensed with.

Where the unadministered estate of a testator had been transferred to the Accountant-General of the Court of Chancery and a bill had been filed praying for it to be administered by the Court, the Court decreed a grant *de bonis non* to the residuary legatee for life, without requiring her to find sureties to the administration bond (*y*).

(*r*) *In the goods of McDonald*, 32 L. J., P. & M. 132; 11 W. R. 957.

(*s*) *In the goods of Harrigan*, 32 L. J., P. & M. 204.

(*t*) *Hughes v. Cook*, 1 Cas. temp. Lee, 386.

(*u*) *In the goods of Roberts*, 1 S. & T. 64.

(*x*) *Re Hardstone*, 2 S. & T. 335.

(*y*) *Cleverly v. Gladdish*, 2 S. & T. 335; 31 L. J., P. & M. 53; 5 L. T. 689.

The Court made an order to dispense with the usual sureties to an administration bond, to be entered into by A. B., who was beneficially entitled to a fund which had been paid into the Court of Chancery and for which the administration was required, it appearing that A. B. was, in consequence of sickness, in great poverty, and unable to induce any of his relatives or friends to become sureties to the bond (z).

The mere fact that a receiver of the personal estate of an intestate has been appointed by the Court of Chancery, is no ground for dispensing with justifying security on a grant of administration. If the receiver is appointed for a temporary purpose only, and it is not clear that the Court of Chancery will retain its control of the estate after the grant has been made, justifying security will be required (a). Not dispensed with.

Where administration is granted to a person out of England, it is preferred that the sureties to the bond shall be resident within the kingdom (b), *but foreign sureties are accepted.* Must be in England.

Where the person applying for administration was solely entitled to the personal estate of the deceased, and there were no creditors, the Court allowed the sureties to the administration bond to be persons resident in Scotland (c). Resident in Scotland.

So a bond has been accepted with sureties resident in Scotland in respect to a grant of administration will to the attorney, also living in Scotland, of the executors named in the will, the executors being abroad (d). Scotch.

Rule 42 provides, that when any person takes a grant of administration, (1) in default of appearance of persons who have been cited but not personally served, or (2) for the use and benefit of a lunatic (unless he be a committeee Sureties to justify.

(z) *In the goods of De la Farque*, 2 S. & T. 631; 31 L. J., P. & M. 199; 7 L. T. 194.

(a) *Jackson v. Jackson*, L. R., 1 P. & D. 12; 35 L. J., P. & M. 3; 13 L. T. 336; 14 W. R. 111.

(b) *Re O'Byrne*, 1 Hagg. 316.

(c) *Herbert v. Shiell*, 3 S. & T. 479; 33 L. J., P. & M. 142. (*In goods of Ballingall*, 3 S. & T. 441, note, overruled.)

(d) *In the goods of Houston*, L. R. 1 P. & D. 85; 35 L. J., P. & M. 41.

duly appointed), a declaration of the personal estate of the deceased must be filed in the registry, and the sureties to the administration bond must justify.

The rules for the District Registries regulating administration are (D. R.) 44, 45, 46, 47, 48, and 49 (*d*).

BONDS, HOW ENFORCED.

C. P. Act,
1858 (21 & 22
Vict. c. 95),
s. 15.

New practice
as to old
bonds.

By 21 & 22 Vict. c. 95, s. 15, it is enacted that "bonds given to any archbishop, bishop, or other person exercising testamentary jurisdiction in respect of grants of letters of administration, made prior to January 11, 1858, or in respect of grants made in pursuance of the Court of

(*d*) The following are some of the more recent decisions on the subject of administration bonds:—

(1) Since Married Women's Property Act, 1882, husband not required to join in bond: *In the goods of Ayres*, 8 P. D. 162; 52 L. J., P. D. & A. 98; 31 W. R. 660; 47 J. P. 440. (2) Grant *de bonis non*, estate administered except as to one legacy; sureties ordered to justify nevertheless: *In the goods of King*, 8 P. D. 162; 52 L. J., P. D. & A. 93; 31 W. R. 843. (3) Guardian of infants who had obtained grant *durante minore ætate* absconded, having partially administered. Grant to attorney of one of the original infants who had meantime attained the age of twenty-one. Attorney allowed to give bond representing present value of estate: *In the goods of Halliwell*, 10 P. D. 198; 54 L. J., P. D. & A. 32; 33 W. R. 371; 49 J. P. 233. (4) Property large, risk small. Court refused to lessen amount to be secured, but allowed security to be made up of any number of bonds: *In the goods of Earle*, 10 P. D. 196; 54 L. J., P. D. & A. 95; 34 W. R. 48; 49 J. P. 761; *In the goods of*

McGowan, 10 P. D. 197; 34 W. R. 48; 49 J. P. 76. (5) Estate being administered in chancery, and order made that each share should be paid by the Court to party entitled, Court allowed penalty of bond to be limited to double amount of beneficial interest of applicant: *In the goods of Paxton*, 14 P. D. 40; 58 L. J., P. D. & A. 58; 60 L. T. 513; 53 J. P. 135. (6) Court allowed administrator *pendente lite* to pay 50*l.* out of estate to a guarantee society that was willing to be surety for him, intervener undertaking to recoup if he failed in suit, and was condemned in costs: *In the goods of Harver*, 14 P. D. 81; 58 L. J., P. D. & A. 72; 61 L. T. 338; 37 W. R. 768. (7) Bulk of estate paid into Chancery Division. Security for double amount of estate remaining to be recovered: *In the goods of Morris*, 15 P. D. 9; 59 L. J., P. D. & A. 16; 61 L. T. 652; 38 W. R. 496. (8) Grant to official receiver in bankruptcy. Sureties dispensed with: *In goods of Cope*, 15 P. D. 107; 59 L. J., P. D. & A. 94; 62 L. T. 500; 38 W. R. 688; *In goods of Knapp or Robins*, 63 L. T. 252; and *In goods of Thacker*, 54 J. P. 759.

Probate Act or of this Act, whether taken under a commission or requisition executed before or after the said 11th of January, shall enure to the benefit of the Judge of the Court of Probate, and, if necessary, shall be put in force in the same manner, and subject to the same rules, so far as the same may be applicable to them, as if they had been given to the Judge of the said Court subsequently to that day."

The Court of Probate has no jurisdiction to compel an administrator, who obtained his grant of administration from an Ecclesiastical Court before 11th January, 1858, to file an inventory of the goods of the deceased in the registry of the Court of Probate. By Court of Probate Act, 1857, s. 87, such inventories are returnable only into the Court of Chancery. The course to be adopted in such a case is to move the Court *ex parte* for a rule, calling upon the principal and sureties to show cause why the bond should not be assigned for breach of the condition without further proceedings. The Court may then, upon being satisfied that an inventory has not been returned into the Court of Chancery, order the Registrar to assign the bond (e).

The enactments contained in sect. 15 of 21 & 22 Vict. c. 95, are not retrospective, so as to enable the assignee of a bond, given to the ordinary before the passing of the C. P. Act, 1857, to maintain an action commenced by him before the passing of the C. P. Act, 1858 (f).

Where, in 1854, an administration bond with two sureties was given to the Bishop of Chester, in 1854, a suit in Chancery was commenced by a creditor of the intestate against his administratrix, and the condition of the bond having been broken, it was ordered, by the Master of the Rolls, that an action should be brought on it against the sureties: the proceedings required by the Ecclesiastical Court to be taken before commencing such action were not completed at the time the Probate Act came into

(e) *Bouverie v. Maxwell*, L. R., 1 P. & D. 272; 36 L. J., P. & M. 3; 15 L. T. 187; 15 W. R. 89.

(f) *Young v. Hughes*, 4 H. & N. 76; 28 L. J., Eq. 161; 5 Jur., N. S. 102.

operation, when the testamentary jurisdiction of the Court of Chester ceased: on motion that the Court should order the bond to be attended with, for the purpose of being put in suit, the Court decreed that the Registrar should order the bond to be assigned for the purpose of being put in suit; *quære* whether, since 20 & 21 Vict. c. 77, an action will lie on such bond (*e*).

Substitution
of sureties.

The Court will not discharge the original sureties to an administration bond, and allow other sureties to be substituted for them (*f*).

An administration bond was attested by two witnesses, but not by the person who administered the oath to the administratrix, as required by Rule 38, P. R., Non-C.; the estate being small, and the administratrix resident in New South Wales, the Court dispensed with the rule and made the grant (*g*).

Rule nisi.

And where a person interested under the estate of a deceased intestate, to whom administration has been taken out, makes out a *prima facie* case of breach of the administration bond, the Court will direct a rule nisi, calling on the sureties to show cause why the bond should not be assigned (*h*).

Assignment
of bond.

The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the

(*e*) *Young v. Oxley*, 27 L. J., P. & M. 30.

(*f*) *In the goods of Stark*, L. R., 1 P. & D. 76; 35 L. J., P. & M. 42; 13 L. T. 682; 14 W. R. 349.

(*g*) *In the goods of Parker*, L. R., 1 P. & D. 301; 36 L. J., P. & M. 26; 13 L. T. 248; 15 W. R. 262.

(*h*) *In the goods of Jones*, 3 S. & T. 28; 32 L. J., P. & M. 26; 8 L. T. 90; 11 W. R. 191.

full amount recoverable in respect of any breach of the condition of the said bond (*i*).

On a *prima facie* case of a breach of an administration bond being established, notice in some form having been given to the sureties, the Court will direct the bond to be assigned; but might refuse to do so, if on cause shown the proceeding appeared to be wholly frivolous and vexatious (*j*).

The Court will order an administration bond to be assigned upon being satisfied that the application for the order is made *bonâ fide*, and upon a *prima facie* case being made out by the applicant, that the condition of the bond has been broken, and that he was entitled to sue the administrator for the breach. Where the alleged breach of the condition of any administration bond was that the administrator had not paid any part of the personal estate of the intestate to one of the next of kin, and the only question in dispute was whether the applicant was one of the next of kin, the Court directed the bond to be assigned to him, upon condition that he would consent to an order that no execution should issue at common law, but that the money, if any, recovered by the judgment should be paid into the registry: leave to appeal refused (*k*).

An administrator swore the estate under twenty pounds and gave the usual bond with A. for surety; subsequently he re-swore the estate under six hundred pounds and gave a fresh bond with two other sureties. He then became bankrupt without having duly administered. The Court ordered the second bond to be assigned, but refused to order the assignment of the first until after the action on the second bond should be decided, it appearing that the estate had been duly administered to the amount for which the surety to the first bond was liable (*l*).

(*i*) C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 83.

(*j*) *Baker v. Brooks, Marshman v. Hughes*, 3 S. & T. 32; 32 L. J., P. & M. 25; 8 L. T. 89; 11 W. R. 110.

(*k*) *In the goods of Young*, L. R., 1 P. & D. 186; 35 L. J., P. & M. 126; 14 L. T. 634; 14 W. R. 821.

(*l*) *In the goods of Irving*, L. R., 1 P. & D. 658; 38 L. J., P. & M. 83; 20 L. T. 684.

Delivered out
to be can-
celled.

Where, under a misapprehension as to the value of the personal estate of an intestate, the penalty of an administration bond was too large, the Court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry in order that it might be cancelled (*m*).

PAYMENTS WITHOUT GRANTS.

The following payments may be made to persons legally entitled on the death of another, without such persons actually taking out probate or administration:—

Seamen, de-
ceased officers
of navy or
marines.

Payments of pay, half-pay, pension or allowance of deceased officers of the navy and marines, and of widows' pensions and allowances from the compassionate fund not exceeding 32*l.*; prize-money similarly due and not exceeding 20*l.*; these payments are made under a certificate, which is described in the act (*n*).

Merchant
seamen,
effects under
50*l.*

Payments by the Board of Trade of the money, effects, or money received for effects sold (if not exceeding in value 50*l.*), to the widow, children, or party legally entitled, of any deceased seaman or apprentice (*o*). And where a merchant seaman or apprentice dies, leaving a will not executed according to the forms required by that statute, the wages and effects of the deceased are to be dealt with by the Board of Trade as if no will had been made (*p*).

Seamen de-
positors.

Similarly all sums due to the estate of any deceased, who is entitled to any deposit in any of the savings banks for seamen, established by the 19 & 20 Vict. c. 41, shall be paid and applied by the Board of Trade in the same manner as the money and effects of a deceased seaman (*q*).

Soldiers.
Pension,
prize-money
or pay up to
100*l.*

The Chelsea Hospital Commissioners, or the Secretary at War, may pay to persons (who prove themselves next

(*m*) *In the goods of Gould*, 4 S. & T. 20; 34 L. J., P. & M. 105; 13 L. T. 193; 11 Jur., N. S. 288.

(*n*) 2 & 3 Will. 4, c. 40, s. 12 (re-

citing 11 Geo. 4, c. 20, s. 69).

(*o*) 17 & 18 Vict. c. 104, s. 199.

(*p*) *Ib.* sect. 200.

(*q*) 19 & 20 Vict. c. 41, s. 5.

of kin, legal representative, or otherwise legally entitled) any pension, prize-money, or pay due to any deceased officer, non-commissioned officer, private, or pensioner, provided it does not exceed 50%, although the applicant has not taken out administration or probate (*r*). This is extended now to 100% (*s*). Pension or prize-money is paid by the Commissioners of the Chelsea Hospital, and pay by the Secretary at War.

With respect to prize-money, the payment is further facilitated by the 2 & 3 Will. IV., which allows the applicant to prove himself, to the satisfaction of the Commissioners of Chelsea Hospital, or their treasurer or deputy-treasurer, to be next of kin, legal representative, or otherwise entitled to any share of the prize-money belonging to a deceased officer, soldier, or other person (*t*). Soldiers, &c.

Where a claim is made for prize-money by the next of kin of foreigners who have been in the British service as non-commissioned officers or soldiers and have died intestate, the treasurer or deputy-treasurer of Chelsea Hospital (where such next of kin reside abroad) is authorized to pay such claim to such next of kin, or some person duly authorized by such next of kin, without requiring the production of letters of administration, or if such foreign non-commissioned officer or soldier die, leaving a will, the treasurer or deputy-treasurer is to pay the person, who by inspection of the original will or an authenticated copy appears to be entitled, without requiring probate (*u*). Foreign soldiers in British service.

Where a depositor in a savings bank dies, leaving a deposit in the bank not exceeding 50%, exclusive of interest, the trustees or managers of the institution may pay the same to the widow or the persons entitled according to the Statute of Distributions or the rules of the institution, unless within a month from the death of the deceased probate of the will of the deceased is produced, or notice in writing Savings bank depositor not exceeding 50%.

(*r*) 11 Geo. 4 & 1 Will. 4, c. 41,
s. 5.

(*t*) 2 & 3 Will. 4, c. 53, s. 25.

(*u*) *Ib.* s. 26.

(*s*) 31 & 32 Vict. c. 90, s. 2.

Illegitimate
depositor.

of a will and the intention to prove it or to take out letters of administration is given to the trustees or managers, and in the latter case, unless such will is proved, or such letters of administration taken out, within two months from the death of the depositor. And such payment is valid as between the trustees or manager and any other person, but not as between the party receiving the money and another who can show a better title (*b*). And if the deceased be illegitimate, the trustees and manager may, with the written authority of the barrister appointed to certify the savings bank rules, pay over the deposit to any one or more of the persons who in their opinion would have been entitled if the depositor had been legitimate (*c*).

These regulations are extended to deposits of savings at the general post office (*d*).

Loan or
friendly
society.

Similarly trustees of any certified loan society or friendly society or certified branch, or of any friendly society already established, may pay to the widower or widow or child (if so directed by the rules of the society) of any deceased member whatever may be due, if not exceeding 50*l.*, if the trustees are satisfied that the deceased left no will, or that no letters of administration will be taken out, without probate or letters of administration. If the rules of the society contain no direction as to whom the money should be paid, the trustees are to pay it according to the Statute of Distributions (*e*).

The treasury
—re officers
in the civil
service.

Similarly, under 31 & 32 Vict. c. 90, the treasury and such departments may, on the death of persons in the civil service entitled to sums under 100*l.*, direct payment thereof without production of letters of administration (*f*); and the enactments previously in force as to the powers of the war department are extended to the limit of 100*l.* (*g*), and the payments are made good as against persons claiming and the office, &c. indemnified (*h*).

(*b*) 7 & 8 Vict. c. 83, s. 10.

& 19 Vict. c. 63, s. 31.

(*c*) *Ib.* s. 11.

(*f*) Sect. 1.

(*d*) 24 Vict. c. 14, s. 14.

(*g*) Sect. 2.

(*e*) 3 & 4 Vict. c. 110, s. 11; 18

(*h*) Sect. 3.

ALTERATION AND REVOCATION.

The alteration or revocation of grants is made by order of the Court, or a Registrar of the Principal Registry. By order of Court or Registrar.

The Registrars will not revoke a grant where it is possible to rectify an error in it by *alteration*;—and for either purpose they require to be satisfied by affidavit of the necessity.

Grants are revoked in such instances as—

When grant to be altered.

Where application is made for probate by two or more executors, and one dies before the grant is sealed.

Where the person obtaining the grant is not of full age.

Where administration has been taken on the suggestion that deceased died intestate, and a will is subsequently found.

Where a codicil altering the appointment of executors is found after the will has been proved.

Grants are altered where the date of death, names or residence of intestate, or administrator's names are incorrect; or where the administratrix being a spinster when sworn to the oath, has married before the grant is sealed; or where intestate is described as a bachelor without parent, but in fact died a widower without child or parent; or in any such case of wrong recital where the same administrator is still entitled to the grant.

It frequently occurs in the administration of an estate, that stock is found belonging to the deceased registered in the books of the Bank by a name differing from that contained in the grant—such as, name in grant, *Charles James Whitworth*: at Bank, *Charles Whitworth*. The Bank Authorities in such cases avoid the responsibility of determining the right to the stock by requiring the administrator to get his grant altered, so as to agree with the deceased's name as it appears in their books. The evidence required by the Registrars that deceased did use the name of *Charles Whitworth* and also *Charles James Whitworth*, and that the stock was purchased by him, before they

Stock in Bank of England.

will order the required alteration to be made, should be sufficient to enable the Bank authorities to deal with such a difference themselves, but they always refuse to do so.

Practice as to
alteration of
grant.

Whether for alteration or revocation, the solicitor leaves the grant with an affidavit of the facts at the Notation Department, where a Registrar's order is prepared, and, when signed by the Registrar, the alteration made in the terms of the order, and a notation of such alteration made on the Records. They are then forwarded to the Registrar, who signs the order. If the grant is to be revoked, the Registrar cuts off the seal of the Court, and signs a notation made on the grant—"Revoked by order dated 1 May, 1880;" and the papers are returned to the Clerk of the Papers, who files them. The revoked grant is, however, returned to the solicitor after a further grant has been extracted for the purpose of obtaining the return of the duty paid on the revoked grant.

Fees for Revocation: Filing Affidavit 2s., Order 5s., Noting 2s. 6d.,—Alteration 2s. 6d., Affidavit 2s., Order 2s. 6d., Noting 2s. 6d. (x).

(x) The following are some of the more recent cases as to alteration and revocation of grants:—

(1) A grant of administration to the estate of an intestate was made to a creditor, who, after his debts had been fully satisfied, absconded and could not be found. A personal representative of the estate being required in an action in the Chancery Division, the Court revoked the grant to the creditor without citing him, and made a new grant to the sole next of kin of the deceased. *In the goods of Bradshaw*, 13 P. D. 18; 57 L. J., P. D. & A. 12; 58 L. T. 58; 36 W. R. 848; 52 J. P. 56.

(2) A woman obtained grant, with will annexed, who had intermeddled with estate, and afterwards

married. Husband deserted her, and could not be found. Application for revocation of old grant and issue of fresh grant refused, because administratrix had intermeddled. *In the goods of Reid*, 11 P. D. 70; 55 L. J., P. D. & A. 75; 54 L. T. 590; 34 W. R. 577.

(3) Chancery Division may have jurisdiction to revoke probate of a will, but ought not, as a general rule, to exercise it. *Bradford v. Young*, 26 Ch. D. 656; 54 L. J., Ch. 96; 50 L. T. 707; 32 W. R. 901.

(4) A grant of probate ought only to be revoked in the Probate Division. *Priestman v. Thomas*, 9 P. D. 210; 53 L. J., P. D. & A. 109; 51 L. T. 83; 34 W. R. 842.

(5) An intestate died, leaving personal estate to the amount of

IRISH AND SCOTCH GRANTS IN ENGLAND.

The practical steps for obtaining the extension of the operation of grants of probate and administration issuing from the Probate Division in England to property possessed by the deceased in Ireland or Scotland, or both, and also for giving force to grants issued in Scotland or Ireland over property of the deceased in England (as already referred to *ante*, pp. 193—198), are as follows:—

To obtain the seal of the Probate Division to a Scotch confirmation, a copy of such confirmation and inventory (if annexed), containing an account of the English and Scotch property, and a statement that the deceased was domiciled in Scotland, must be taken with the original confirmation to the Receiver of Papers—the papers upon examination being found correct are forwarded to the Clerk of the

273*l.* in this country, and 6,100*l.* in the Italian *rentes*. The Italian Court refused to grant the authority required to deal with the property within its jurisdiction, on the ground that the letters of administration granted by the Court of Probate here were, on the face of them, limited to the smaller amount in this country; and that this Court, if it had been made aware of the full value of the estate, would have required greater security for its administration. The Court allowed the letters of administration to be amended, the Board of Inland Revenue having signified its consent to accept the succession duty on the Italian *rentes* as probate duty, so as to state on the face of them that the larger sum was also included. *In the goods of Henley*, 11 P. D. 126; 55 L. J., P. & D. 61; 56 L. T. 895; 35 W. R. 184; 50 J. P. 520.

(6) An administrator could not be found, having absconded after

threatening to commit suicide, and the only estate remaining unadministered was a claim for debt against a bankrupt's estate. The Court, without citation, revoked the grant, and made a new grant to one of the next of kin. *In the goods of Covell*, 15 P. D. 8; 59 L. J., P. D. & A. 7; 61 L. T. 620; 38 W. R. 79.

(7) An application to revoke a grant of administration can only be made on motion if all parties consent to its being so heard. If such consent be withheld, the Court will decline to deal with the matter, and an action must be commenced for the revocation of the grant. *In the goods of Baddeley*, 60 L. T. 237; 53 J. P. 40.

(8) No further grant will be made if there is already a grant in existence until such grant has been revoked. *In the goods of Hornbuckle*, 15 P. D. 149; 59 L. J., P. D. & A. 78; 63 L. T. 464; 39 W. R. 80.

Seal, who will write the usual fiat for the Registrar's signature, that the grant may be sealed with the seal of the Principal Registry of the Probate Division in England. The confirmation is then passed on to the Sealer, who will affix the seal of the Court to it, and deliver it out on production of the receipt.

Fees.	£	s.	d.
Receipt.....	0	1	0
Filing Copy of Confirmation	0	2	6
Collating ditto if under 10 folios, or 3d. per folio.	0	2	6
Search—6d. a year from date of death	0	0	6
For Sealing	1	0	0

RESEALING AN ENGLISH GRANT IN SCOTLAND.

To obtain the like extension in Scotland of a grant made in the Probate Division in England, it is necessary that a note appear on such grant that deceased died domiciled in England.

The following oath to be used in each case in lieu of the usual oath :—

Extracted by .
Solicitor's Name and Address .

Oath for Executors.

[When stamp duty is paid upon the total value of the personal estate in England and Scotland or in the United Kingdom, and where the testator's domicile is to be noted upon the probate, under the 21 & 22 Vict. c. 56.]

IN THE HIGH COURT OF JUSTICE,
Probate, Divorce, and Admiralty Division.
(Principal Probate Registry.)

In the goods of
deceased

Insert the names, postal addresses, and titles or professions of the executors making the oath, commencing "I," or "We," (a) "make oath and say," or "do solemnly and sincerely affirm."

Each testamentary paper to be marked by each party sworn and by the person administering the oath.

(b) with 1, 2, or 3 codicils, if so.

(c) Or "formerly of," &c., "but late of."

State trade, profession, or status of deceased.

+ State relationship to the deceased.

(d) "I am the sole executor," or "the surviving

make oath (a) and say, that believe the paper writing hereunto annexed and marked by to contain the true and original last will and testament (b) of late of (c) that † deceased; that (d) therein named, and that will well and faithfully administer the personal estate and effects of the said testat by paying debts and the legacies contained in will so far as the same shall thereto extend and the law bind ; and that

executor," or "one of the executors," or "we are the executors," or "the surviving executors," or "two, &c., of the executors."

Nett £
Stamp £

will exhibit a true and perfect inventory of all and singular the said estate and effects, and render a just and true account thereof whenever required by law so to do; that the testat died at on the day of 18 and that the whole of the personal estate and effects of the said testat in England amounts in value to the sum of

* If no property in Ireland—

"And that he was not, at the time of h death, possessed of or entitled to any personal estate or effects whatsoever in Ireland."

If property in Ireland—

"And that the whole of the personal estate and effects of the said testat in Ireland, at the time of h death, amounts to the sum of and no more, to the best of of knowledge, information, and belief."

and no more, to the best of knowledge, information, and belief(y). And further make oath and say that the said testat was domiciled in England at the time of h death.*

And that the whole of the personal estate and effects of the said testat in Scotland amounts in value to the sum of

and no more, to the best of knowledge, information, and belief, and that the whole of the personal estate and effects of the said testat in the United Kingdom amounts in value to the sum of and no more, to the best of knowledge, information, and belief.

(y) In administrations and administration wills add these clauses to the usual oath.

Sworn by the above-named
on the
day of 189 ,
before me,

A Commissioner to administer Oaths in
the Supreme Court of Judicature.

A copy of the engrossment and grant is left with the clerk of the Commissary Court at Edinburgh, who will indorse on such grant a certificate to the following effect:—

"I, A. B., Commissary Clerk, a commissary clerk depute of the county of Edinburgh, hereby certify that this grant of probate, or these letters of administration, have been produced in the Commissary Court of this county, and that a copy thereof has been deposited with me."

For the re-sealing of a grant of probate obtained in Ireland, a copy of the engrossment and grant is left with the Receiver of Papers, who will forward them, when the copy has been examined and found to be correct, to the Clerk of the Seat, who will write the fiat as in confirmation—and the grant will be obtained from the Sealer in the

same manner. An affidavit as to the property will also have to be filed at the Inland Revenue Office in order that the Probate Duty Clerk may send to the Clerk of the Seat a certificate that the proper duty has been paid. In cases of grants of administration with the will annexed or administration, in addition to such copies as above [in cases of probate] a certificate from the Registrar of the Irish Court to the effect that bond has been given in a sum sufficient to cover the property of deceased in England and Ireland must be filed. If there be no effects of deceased in England save trust property, it should be so stated in the certificate of the Registrar in Ireland.

	FEES.	£	s.	d.
Receipt		0	1	0
Filing Certificate—Stamp Office.....		0	2	6
Filing Irish Registrar's Certificate.....		0	2	6
Collating Copy to be filed—3 <i>d.</i> per folio.				
Fiat for Seal		0	5	0
Search—6 <i>d.</i> per year.				
For Sealing—the same sum as would be payable on a grant made here on the amount of pro- perty in England.				
(For re-sealing in Ireland an English grant the procedure is similar.)				

In searching for such re-sealed grants reference will be found in the Calendars kept by the Record Keepers for Irish and Scotch grants.

In such cases where there is "*Stock*" the Bank of England requires a *certified* copy of the Record from the Probate Registry here, which can be ordered in the Public Office of the Registry, Somerset House.

	FEES.	£	s.	d.
Search		0	1	0
Impressed Stamp		0	1	0
Copy Record		0	2	6
Certificate		0	2	6

And also where a Probate granted to one or more of the executors—power being reserved to other executors—is presented at the Bank, a *certificate* is required under the hand of a Registrar of the Probate Registry, showing that no grant has since issued to the executor to whom power

is reserved. For this a written application is made to the Record Keepers. Two copies of the record are made, upon which it is certified that no other grant than that referred to has been made. One copy is given to the party, the other copy is filed.

	FEES.	£	s.	d.
One Copy		0	2	6
Certifying		0	2	6
Impressed Stamp		0	1	0
Other Copy		0	2	6
Filing		0	2	6
Impressed Stamp		0	1	0
Search 6 <i>d.</i> a year from date of first grant.				

BILL OF COSTS FOR RE-SEALING A SCOTCH GRANT.

	£	s.	d.
Instructions for Re-sealing	0	6	8
Copy of the Grant to file—4 <i>d.</i> per folio of 72 words	0	0	0
Attending and leaving the Papers at the Probate Registry ...	0	6	8
Stamp for Receipt	0	1	0
For Collating Copy to be filed—3 <i>d.</i> per folio of 92 words ...	0	0	0
Filing same	0	2	6
Filing Interlocutor	0	2	6
Attending at Registry and instructing for Re-sealing	0	6	8
Stamp on Re-sealing	1	1	0
Extracting (ad valorem as on a Grant)	0	0	0
Clerk's—ditto	0	0	0
	£2	7	0

BILL OF COSTS—RE-SEALING AN IRISH GRANT.

	£	s.	d.
Instructions for re-sealing	0	6	8
Ditto, for affidavit if made here	0	6	8
Drawing and engrossing same, 1 <i>s.</i> 4 <i>d.</i> per folio of 72 words ..	0	0	0
Ditto, for Schedules of Property (two copies)	0	0	0
Attending swearing	0	6	8
Paid Commissioner	0	1	6
Attending at Stamp Office with Affidavit and Grant for his Certificate	0	13	4
Attending at Registry and ascertaining that Certificate has been received	0	6	8
Copy of Grant to file—4 <i>d.</i> per folio of 72 words	0	0	0
Attending at Registry with Paper	0	6	8
Stamp on Receipt	0	1	0
Ditto, for collating Copy to be filed—3 <i>d.</i> per folio of 92 words ..	0	0	0
Fling Inland Revenue Certificate	0	2	6
Ditto Copy Grant	0	2	6
Attending at Registry, and instructing for Re-sealing	0	6	8
Stamp in Registrar's Fiat	0	5	0
Re-sealing, such Fee as would be payable in respect of a Grant on the Property in England	0	0	0
Extracting ditto	0	0	0
Clerk's Fees ditto	0	0	0
	£3	16	4

INCREASE OF DUTY.

On increasing the duty in administration (will) and administrations, it is necessary to file an affidavit in accordance with the form following, and a fresh bond in double the full amount of the property. And if there should have been a reason for delay filed in the first instance, an amended reason will be required. Upon these, with the administration, being left with the Notation Department for one clear day, and the old papers looked up by the Record Keeper, a certificate for the Registrar's signature will be prepared, which will have to be taken to the Inland Revenue Office, with the administration—when the proper duty can be paid.

The Inland Revenue Office also requires an affidavit to lead the increase, a form of which is given on application.

AFFIDAVIT TO LEAD TO NOTATION WHERE THE EFFECTS
HAVE ORIGINALLY BEEN SWORN TOO LOW.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Probate Registry.)

In the goods of Mary Clarke, widow, deceased.

(a) with the will
annexed, if so.

I, George Clarke, of No. 10, East Street, Hornsey, in the county of Middlesex, Gentleman, make oath and say that on the 1st day of May, 1879, letters of administration (a) of all and singular the personal estate and effects of the said Mary Clarke, late of No. 10, East Street aforesaid, widow, deceased, was granted to me the said George Clarke in the Probate Principal Registry of her Majesty's High Court of Justice, I having previously made oath that the whole of the personal estate and effects of the said deceased were under the value of one thousand pounds.

And I further make oath and say that it has since been discovered that the personal estate and effects of the said deceased exceed in value the said sum of one thousand pounds, but are under the value of one thousand five hundred pounds.

Sworn by the said George Clarke, at Hornsey }
aforesaid, this 1st day of May, 1881, } GEORGE CLARKE.

Before me,

JOHN DAVIS,

Commissioner, &c.

PERSONS BEFORE WHOM OATHS AND AFFIDAVITS CAN BE
SWORN.

The Commissioner for Oaths Act, 1889, repeals 20 & 21 Vict. c. 77, s. 27, to "*provided that*," and from "*and any*

person who” to end of section; and enacts that a commissioner for oaths may, in England or elsewhere, administer any oath or take any affidavit for the purpose of any Court or matter in England.

England, Ireland, Scotland and the Channel Islands.—Any person qualified to administer an oath in either country.

Foreign Countries.—Any oath or affidavit required for the purpose of any Court or matter in England may be taken or made in *any place out of England*, before any person having power to administer an oath in such place.

CHAPTER XXI.

SUMMONSES AND MOTIONS.

* * * *The notes in the following pages marked [D.] have been kindly supplied by Mr. Davidson, Clerk of the Papers.*

Summonses. PREVIOUS to the passing of the Judicature Acts the practice as to summonses in the Probate Court was regulated entirely by the Probate Rules, 1862, 98 to 106, for contentious business.

At the same time, though laid down for "contentious," they applied equally to "non-contentious" business.

Non-contentious business not affected by Judicature Acts.

By sect. 18 of the Judicature Act, 1875, it is provided that the rules of the Court of Probate shall remain in force except where expressly varied by the Rules of the Supreme Court. It has also been held by Hannen, P., that the Judicature Acts have no effect whatever upon the non-contentious branch of the Probate Division (a).

These rules, therefore, apply to all summonses in non-contentious matters, and they also apply to all summonses in contentious business so far as they are not overridden by the Rules and Orders of the Supreme Court.

Probate Rules.
Rule 98,
C. B.

By Rule 98, Contentious Business, "A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding."

Rule 99,
C. B.

By Rule 99, Contentious Business, "A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar" (b).

By Rule 100, Contentious Business, "The clerk of the

(a) *In the goods of Tomlinson*, 6 P. D. 209; 50 L. J., P. D. & A. 74; 30 W. R. 61.

(b) Two forms are now obtained. The clerk of the papers stamps the summons with the president's stamp.—[D.]

papers is then to enter the name of the cause or matter, and of the agent taking out the summons, in the summons book, and return the summons (with the stamp cancelled) signed, to the applicant, who is to serve a copy on the party summoned" (c). Probate Rules.
Rule 100,
C. B.

Although this rule has not been repealed, the present practice is for the clerk of the papers to initial the summons instead of affixing the stamp and cancelling it.

By Rule 101, Contentious Business, "On the day and at the hour named in the summons, the party issuing the same is to present himself with the original at the judge's chambers." Rule 101,
C. B.

By Rule 102, Contentious Business, "Both parties will be heard by the judge, who will make such order as he may think fit, and a note of such order will be made by the registrar in the summons book." Rule 102,
C. B.

By Rule 103, Contentious Business, "If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit" (d). Rule 103,
C. B.

By Rule 104, Contentious Business, "An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient and bar the party taking out the summons from the right to go before the judge on that occasion." Rule 104,
C. B.

By Rule 105, Contentious Business, "If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons or the copy served on the opposite party must be filed in the registry. An order will thereupon be drawn up and delivered to the person filing such summons or copy. The Rule 105,
C. B.

(c) The second form mentioned in the last note is left with the clerk of the papers.—[D.]

certain summonses are returnable before the judge. Most come before the registrars in the first instance.—[D.]

(d) As will be seen later, only

Probate
Rules.

clerk of the papers, before giving out the order, is to see that the proper stamp has been affixed to it, and is to cancel such stamp." Though this rule has not been repealed, the stamp is no longer cancelled. In fact, the practice as to stamps is entirely altered. They are no longer affixed to documents, but kept in the registry and destroyed.

Rule 106,
C. B.

By Rule 106, Contentious Business, "If a summons is brought to the clerk of the papers, with a consent to an order indorsed thereon, signed by the party summoned or by his . . . solicitor . . . an order will be drawn up without the necessity of going before the judge: Provided that the order sought is, in the opinion of the registrars, one which, under the circumstances, would be made by the judge."

Ord. LIV.
r. 1.

By Order LIV., R. S. C., 1883, r. 1, "Every application at chambers not made *ex parte* shall be made by summons."

Rule 12.
Jurisdiction
of masters to
be same as of
a judge at
chambers.

By r. 12. In the Queen's Bench Division a master, and in the Probate, Divorce, and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Acts or these rules may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters; that is to say,—

Exceptions.

- (a.) All matters relating to criminal proceedings or to the liberty of the subject:
- (b.) Granting leave for service out of the jurisdiction of a writ, or notice of a writ, of summons:
- (c.) The removal of actions from one division or judge to another division or judge:
- (d.) The settlement of issues, except by consent:
- (e.) Inspection and other orders under Order L., rules 1 to 5:
- (f.) Appeals from district registrars:
- (g.) Prohibitions:
- (h.) Injunctions and other orders under sub-section 8 of section 25 of the principal Act:

(i.) Awarding of costs, other than the costs of or relating to any proceeding before a master, or registrar, and other than costs which by these rules, or by the order of the Court or a judge, he is authorised to award :

Probate
Rules.
Ord. LIV.
r. 12.

(k.) Reviewing taxation of costs :

(l.) Orders absolute for charging stocks, funds, annuities, or share of dividends, or annual proceeds thereof :

(m.) Acknowledgments of married women.

Summonses for further time to plead, to amend pleadings, for further particulars, to strike out irrelevant or prolix pleadings, for further and better answers to interrogatories, for discovery and inspection, for taking evidence by special examination, and to appoint a guardian *ad litem* to an infant plaintiff or defendant, are among the most usual that come before the registrars.

Matters
coming before
the registrars
on summonses.

Applications for leave to cite the heir-at-law are now usually made by summonses.

By Order LIV. r. 21, "Any person affected by any order or decision of a master may appeal therefrom to a judge at chambers. Such appeal shall be by way of indorsement on the summons by the master at the request of any party, or by notice in writing to attend before the judge without a fresh summons, within four days after the decision complained of, or such further time as may be allowed by a judge or master."

Ord. LIV.
r. 21.
Appeal from
master.

The time for appealing from an order made by a registrar of the Probate Division is the same as that limited by the above Rule 21, for appealing from an order of a master : viz., four days from the decision, though a registrar is not named in that rule (*e*).

Time for
appeal in
Probate
Division.

R. 22. "An appeal from a master's decision shall be no stay of proceeding, unless so ordered by a judge or master."

Rule 22.

Appeals to the Court of Appeal from orders made in

Appeals from

(*e*) *In the goods of Patrick*, 14 P. D. 42; 58 L. J., P. D. & A. 36; 60 L. T. 343; 37 W. R. 393.

Probate Rules.
chambers to Court of Appeal.

Rule 64,
C. B.

Matters formerly brought by act on petition now brought by summons.

Matter proper for summons must not be brought on motion.

Summonses, when heard.

chambers are subject to the same rules in the Probate Division as in the Chancery Division, and will not be entertained unless the judge gives leave to appeal direct, or certifies that he does not require to hear further argument (*f*).

By Rule 64, Contentious Business, "Any question arising in a cause, and not being one of interest, domicile, or other matter usually brought before the Court by declaration and plea, may be brought before the Court by petition." These questions may arise when no suit is pending, or as collateral or incidental to a cause, as for example:—

If there is a contest for a grant of administration, and the interest is admitted, but the parties being in an equal degree of relationship, the one seeks to deprive the other on the ground of want of business habits, improper conduct, or the like, of the grant, that question was formerly decided on act on petition, and is now decided by the judge in chambers on summons. So also may be questions as to personal qualifications, jurisdiction (in some instances), the justification of sureties, guardianships, and the like. Most of these matters are decided in the first instance by the registrars.

It is often doubtful whether a matter ought to be brought before the Court in the first instance by summons or motion. In such case the practitioner must be extremely careful, as if a matter is brought before the Court on motion which ought to have been heard in chambers, the party offending may be condemned in costs.

A copy of the summons must be served on the party summoned before 7 P.M. (or on Saturdays before 2 P.M.), one clear day at least before the summons is returnable.

As a general rule the judge hears summonses on Tuesdays during the sittings, at 10.15, and the registrars hear summonses on Mondays at Somerset House, at 11.30

(*f*) *Rigg v. Hughes*, 9 P. D. 68; 53 L. J., P. D. & A. 62; 50 L. T. 293; 32 W. R. 355. An appeal to the Court of Appeal from an order in chambers must be brought within twenty-one days.

o'clock; therefore, a registrar's summons should be served on Friday before 7 P.M., and a judge's on Saturday before 2 P.M. Summonses are heard by the registrars during the long vacation, every Wednesday at 12. Probate Rules.

Motions to the Court are constantly necessary, both in non-contentious and contentious business. Motions.

As with summonses, formerly the practice as to motions was governed entirely by the Court of Probate Rules of 1862. Since the passing of the Judicature Acts it has been governed partly by those rules and partly by Order LII. (R. S. C., 1883), rules 1—15.

By Rule 110 (Contentious Business), "It shall be sufficient to leave all notices and copies of pleadings and other instruments which by the rules and orders of the Court are required to be given or delivered to the opposite parties in a cause, or to . . . their solicitors . . . and personal service of which is not expressly required, at the address furnished by such parties respectively." R. 110, C. B.

By Rule 111 (Contentious Business), "When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the other parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the Registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the judge, or of the Registrars in his absence." R. 111, C. B.

By Rule 112 (Contentious Business), "If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded, on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the judge shall otherwise direct." R. 112, C. B.

By Rule 113 (Contentious Business), "When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof (*g*), under

(*g*) Or an order drawn up in the first person with a judge's stamp.—[D.]

B.

Z

- Probate Rules. seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the commissioner or other person before whom the affidavit is sworn."
- R. 124, C. B. By Rule 124 (Contentious Business), "Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded."
- R. 125, C. B. By Rule 125 (Contentious Business), "If the cases tendered are deficient in any of the above particulars, the same shall not be received in the Registry without permission of one of the Registrars."
- R. 126, C. B. By Rule 126 (Contentious Business), "On depositing the case in the Registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the Registry; or in case such affidavits or documents have been already filed or deposited in the Registry, the same must be searched for, looked up, and deposited with the proper clerk" (*i.e.*, the CLERK OF THE PAPERS) "in order to their being sent with the case to the judge."
- O. XXXVII. *Where a writ has issued*, affidavits are still *filed* in the r. 3d. Registry, and not at the Central Office under Order XXXVII. r. 3d.
Probate Registry.
- R. 127, C. B. By Rule 127 (Contentious Business), "Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit who are entitled to be heard in opposition thereto."

MOTIONS AND OTHER APPLICATIONS.

- Ord. LII. By Order LII., r. 1 (*h*), "Where by these rules any application is authorised to be made to the Court or a judge, r. 1.
Application by motion.

(*h*) See Annual Practice, 1892, pp. 837—849.

such application, if made to a divisional Court or to a judge in Court, shall be made by motion." Ord. LII. r. 1.

By r. 2, "No motion or application for a rule *nisi* or order to show cause shall hereafter be made in any action, . . . or (b) for attachment, or (c) to answer the matters in an affidavit, or . . . or (e) against a sheriff to pay money levied under an execution." R. 2. Restriction on rules *nisi* and orders to show cause.

By r. 3, "Except where according to the practice existing at the time of the passing of the principal Act any order or rule might be made absolute *ex parte* in the first instance, and except where notwithstanding rule 2 a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or a judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside." R. 3. Where notice of motion to be given. *Ex parte* application.

By r. 4, "Every notice of motion . . . for attachment, . . . shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." R. 4. When grounds of notice of motion to be stated.

By r. 5, "Unless the Court or a judge give special leave to the contrary there must be at least two clear days (i) between the service of a notice of motion and the day named in the notice for hearing the motion: provided that in applications to answer the matters in an affidavit . . . the notice of motion shall be served on the parties not less than ten clear days before the time fixed by the notice for making the motion." R. 5. Length of.

(i) Four days is the practice in the Probate Division, by r. 111 (C. B.), *ante*, p. 337. However it appears to have been held that under Ord. LII. r. 5, two days' notice is sufficient: *Donovan v. Donovan*, Law Times, 1891, p. 56.

Ord. LII.

r. 6.

Motions may be dismissed or adjourned where necessary notice not given.

By r. 6, "If on the hearing of a motion or other application the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or judge may think fit to impose."

R. 7.

Adjournment of hearing.

By r. 7, "The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit."

R. 8.

Service of notice on defendant served with writ but not appearing.

By r. 8, "The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear, has not appeared within the time limited for that purpose."

R. 9.

Service of notice of motion with writ.

By r. 9, "The plaintiff may, by leave of the Court or a judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons, and before the time limited for the appearance of such defendant."

R. 11.

Notice to sheriff to return writ, &c.

By r. 11, "No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not represented by a solicitor), or by his solicitor, calling upon the sheriff to return such writ or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of such sheriff."

R. 13.

Date of order when drawn up.

By r. 13, "Every order, if and when drawn up, shall be dated the day of the week, month, and year, on which the same was made, unless the Court or a judge shall otherwise direct, and shall take effect accordingly."

R. 14.

What orders need not be drawn up.

By r. 14, "Where an order has been made not embodying any special terms, nor including any special directions, but simply enlarging time for taking any proceeding or doing any act or giving leave (a) for the issue of any

writ other than a writ of attachment, (b) for the amendment of any writ or pleadings, (c) for the filing of any document, or (d) for any act to be done by any officer of the Court other than a solicitor, it shall not be necessary to draw up such order unless the Court or a judge shall otherwise direct; but the production of a note or memorandum of such order, signed by a judge, registrar, master, chief clerk, or district registrar, shall be sufficient authority for such enlargement of time, issue, amendment, filing, or other act. A direction that the costs of such order shall be costs in any cause or matter shall not be deemed a special direction within the meaning of this rule. The solicitor of the person on whose application such order is made, shall forthwith give notice in writing thereof to such person (if any) as would, if this rule had not been made, have been required to be served with such order."

Ord. LII.
r. 14.

What orders
need not be
drawn up.

During the sittings of the Court, motions are made by counsel at eleven or half past eleven o'clock on Tuesdays; and papers for motions must be left with the clerk of the papers at the Principal Registry before two o'clock on the previous Thursday.

When heard
during the
sittings.

During the long vacation motions are made by counsel before the Registrars at twelve o'clock on days that are announced beforehand; and if, *as is usually the case*, the days fixed be Wednesdays, papers must be left with the Clerk of the papers before two o'clock on the previous Saturday.

During the
long vacation.

If it is proposed to prove any will in a district registry after probate granted on motion, a copy of the will must be deposited in the principal registry, and the original will will be transmitted by the principal registrars on receipt of a letter requesting them to do so, and specifying the district.

Probate of
will in district
registry after
grant on
motion.

The following are some of the principal cases in which the Court is asked to make a grant on motion:—

Matter properly
brought
before Court
on motion.

- (1.) Where it is doubtful whether some portion of a testamentary document ought or not to be admitted to probate. In this case it is necessary for all the parties to consent, otherwise the will must be **propounded**.

By consent as
to omitting
portion of
testamentary
document
from probate.

- (2.) Where an application is made for a grant by a person having an inferior right to it, and the parties having the superior right have not renounced (*n*).
- Lost will. (3.) Where a will has been lost, and all parties consent to a draft or copy or an affidavit setting forth the contents of the will being admitted to probate.
- Presumption of death. (4.) Where the death of a testator or intestate is uncertain and can only be proved by presumptive evidence.
- Order for attachment. (5.) For an order for attachment for contempt of Court, which may arise out of *non-contentious*, as well as *contentious, business*.
- Order for production of papers, &c. (6.) For an order for the production of papers or writings purporting to be testamentary when a writ has not been issued.
- If a writ has been issued, and an action is pending, this application has to be made on summons in chambers (*o*).
- Ad colligenda bona.*
C. P. Act, 1857, s. 73.
For limited grant where applicant entitled to general grant. (7.) For a grant *ad colligenda bona*.
- (8.) For a grant of administration under the 73rd section of the Court of Probate Act, 1857.
- (9.) For a limited grant where the applicant is entitled to a general grant.
- (10.) For a grant *durante absentiâ*.
- Durante absentiâ.*
Matter referred to Court by Registrars. (11.) For a grant where the matter has been referred to the Court by the Registrar.
- For order to vary an administration bond. (12.) For an order to dispense with sureties to an administration bond, or to limit their liability, or to reduce the penalty on the bond, or to allow a substitute to execute it for the administrator.
- Administrator *pendente lite* or receiver. (13.) For an order for the appointment of an administrator *pendente lite* or a RECEIVER.
- (14.) For a grant to the Attorney-General on behalf of the Crown of administration to the estate of a

(*n*) This is generally after citing them.—[D.] dévrit to be in the possession of a certain person, a *subpoena* will issue

(*o*) If the papers are shown on affidavit whether there is a writ or not.—[D.]

bastard or other person who has died intestate, leaving no known relatives or other persons entitled to his estate.

And it may be further stated, generally, that whenever a grant is required under exceptional circumstances a motion to the Court becomes necessary.

Whenever grant required under special circumstances motion necessary.

Pro formâ motions for probate are not uncommon, the object being to avoid misunderstanding, and possibly litigation, about the instrument between legatees. As where a paper writing, purporting to be a will, appears clearly from the affidavits of the attesting witnesses to have been not duly executed, and a person appointed executor by it is desirous of obtaining the decision of the Court that it is inoperative as a will, he may do so by moving the Court to decree probate (*p*).

Pro formâ motions.

In an interest suit, where the real question in dispute was the legitimacy of the defendant, the Court refused to strike out the defendant's defence on motion, holding that this was too serious a matter to be decided in that way, but must be decided by evidence in the course of the action (*q*).

Striking out defence, real question one of legitimacy, Court refused to do this on motion.

On an application for a grant of administration to the effects of an intestate on behalf of H.R.H. the Prince of Wales as Duke of Cornwall, it is not necessary that the facts should be verified by affidavit if they are sufficiently set forth in the warrant (*r*).

For grant on behalf of Duke of Cornwall facts need not be verified by affidavit if set forth sufficiently in warrant.

In cases of presumption of death, it should be borne in mind that the Court never acts on any affidavit that is uncorroborated, and exercises the utmost vigilance.

An affidavit of some member or members of the family of the deceased is required by the present practice of the Court, and, if such cannot be obtained, an affidavit should be made to that effect.

Present practice of Probate Division in cases of presumption of death. Advertisements.

Any advertisements which may have been inserted in the newspapers for the purpose of finding the deceased

(*p*) *In the goods of Jackson*, 28 L. J., P. & M. 32.

(*r*) *In the goods of Griffith*, 9 P. D. 63; 53 L. J., P. D. & A. 30;

(*q*) *In the goods of Harrington*, 63 L. T. 228.

32 W. R. 524; 48 J. P. 312.

Presumption
of death.

ought to be filed for the information of the judge; and all letters from the deceased or others, tending to throw light upon the matter, should be made exhibits to the affidavits.

The originals will be delivered out afterwards, upon application, to the parties entitled to them.

It is desirable to show on affidavit whether or not the life of the deceased was insured.

Notice to
insurance
company.

This practice was first introduced in 1880 by Lord Hannen, who, in the course of an unreported case heard in that year, said, "Without laying it down as an absolute rule of practice, I think this ought to be done in every case."

And this dictum has been taken up and carried further, so that the rule as to notice to insurance offices has now become obligatory in every case.

So, where the estate of a person whose death the Court was asked to presume consisted in part of a policy of insurance on his life, the Court ordered that notice of the application should be given to the insurance office (*t*).

Court will not
presume the
death of a
person other
than the
person whose
estate is in
dispute.

It is contrary to the practice of the Court to presume the death of a person other than the person whose estate is in question. Therefore, where a married woman died intestate in March, 1889, without issue or parents, having lost all trace of her husband since July, 1873, and application was made to the Court by her natural and lawful sister, and one of her next of kin, for leave to presume the death of the husband of the said intestate; the application was refused (*u*). It would seem that the proper course in such a case would be to cite the husband by advertisement.

Every effort
must be made
to find
deceased.

It may be taken as a general rule that the Court will not presume the death of a deceased person, unless fully satisfied that every reasonable endeavour has been made to find him. One of the most usual modes of endeavouring to obtain information is naturally by advertisement, and the Court, if not satisfied that enough has

(*t*) *In the goods of Barber*, 11 P. D. 78; 56 L. T. 894; 35 W. R. 80. See also *In the goods of Kirkbride*, 55 J. P. 503. (*u*) *In the goods of Clark*, 15 P. D. 10; 59 L. J., P. D. & A. 6; 61 L. R. 448; 38 W. R. 448.

been done in this direction, orders advertisements to issue under direction of one of the registrars. Presumption of death.

In some cases, however, under special circumstances, as where death has been presumed in Chancery proceedings, the Court has dispensed with advertisements (*x*). Death presumed in Chancery Division.

Though a person, unheard of for seven years, is presumed to be dead, there is no *primâ facie* presumption as to the date of his death during that time. So where the husband of a testatrix had not been heard of for more than seven years, the Court held that he might, under the circumstances, be presumed to have died before his wife, as there was no legal presumption that his death took place at the end of seven years, and that consequently her will was valid (*y*). Person not heard of for seven years.

A., master of the X., sailed in her from Demerara on the 23rd of October, 1858, bound for London, the ordinary duration of the voyage being five or six weeks; a few days after sailing a hurricane passed over the West Indian Islands, in which it was supposed the X. and all hands had been lost, neither the vessel nor any of the crew having been heard of since the vessel sailed. The Court rejected a motion made on the 30th March, 1859, for a grant of administration of the effects of A. as premature; but on 22nd June, 1859, the underwriters having then paid the amount insured on the vessel, and nothing having been heard of either her or any of the crew, administration was granted (*z*). Vessel lost on voyage to Demerara.

But, although payment by the insurers may presuppose a total loss of the *ship*, it does not follow that all the *crew* are drowned; and inquiries, in general, should be made at the port of departure for any of the missing crew. For, Payment by insurers not alone sufficient for presumption of death.

(*x*) *Thomas Wood*, May 26, not reported, cited *Tristram on Probate*, 11th ed., p. 220. See also *Hagg. 544. 554*

In the goods of Norris, 1 S. & T. 6; 27 L. J., P. & M. 4; *In the goods of Main*, 1 S. & T. 11; 27 L. J., P. & M. 5; *Dean v. Davidson*, 3 (y) *In the goods of How*, 1 S. & T. 53; 27 L. J., P. & M. 37; 4 Jur., N. S. 366.

(z) *In the goods of Bishop*, 1 S. & T. 303; 28 L. J., P. & M. 93; 7 W. R. 375.

Presumption
of death.

where on the 15th November, 1857, G. S. sailed from Barcelona to Constantinople, the average duration of the voyage being thirty days, and the vessel had never arrived at her destination, nor had anything since been heard of her or her crew, and the insurers had paid as on a total loss; as it did not appear that any inquiries had been made for the crew at Barcelona, the death of the deceased was only allowed to be presumed conditionally, on an affidavit of such inquiries having been made without result being filed in the registry. Motion made 13th November, 1858 (*a*).

Not heard of
for seven
years.

In September, 1859, the presumption arose that A., who had not been heard of for seven years, was dead; but there were no circumstances from which the date of his death could be inferred; in 1857, his father, who would have been entitled to administration, had he survived A., died intestate, and no administration was taken out to him; it being uncertain whether A. or his father survived, the Court, under the 73rd section of the Probate Act, 1857, granted administration of the effects of A. to his sister, without requiring administration to the father to be taken out. *Semble*, that, if there had been a legal personal representative of the father, the Court would have required his consent before making such a grant (*b*).

Voyage of
ten weeks.
Grant after
twelve
months.

On the 27th of January, 1857, M., master of the ship B., sailed in her on a ten weeks' voyage. Nothing having been seen or heard of the ship or of any of her crew, since she sailed, and the underwriters having paid for her as for a total loss, it was held the death of M., in or since January, 1857, might be presumed. This motion was made the 28th January, 1858 (*c*).

History of
deceased
traced up
to a certain
point.

N., intending to come to England, sailed on 1st July, 1856, from New Zealand in a ship bound for Sydney; the ship never arrived at Sydney, nor was anything ever heard

(*a*) *In the goods of Smyth*, 28 L. 506; 29 L. J., P. & M. 95.
J., P. & M. 1. (*c*) *In the goods of Main*, 1 S. &
(*b*) *In the goods of Peck*, 2 S. & T. T. 11; 27 L. J., P. & M. 5.

of her or the crew after she set sail; some heavy gales having occurred at the time she would have been on her voyage and in her direct course, it was supposed that she had foundered with all hands. Advertisements not having been inserted in the newspapers for information concerning N.: it was held that, under the above circumstances, as N.'s history was traced up to a certain point, and he was then lost sight of, advertisements were unnecessary, and that his death was to be presumed (*d*).

Presumption of death.

Where a claim of succession is made, either under a will or an intestacy, on behalf of either of two persons who have died together—*commorientes*, as they were termed in the old Ecclesiastical Courts—the question arises as to the survivorship; for the old doctrine or *dictum* that two persons might die by the same calamity or accident at the same instant of time has been abandoned, as being, humanly speaking, hardly possible (*e*). Two persons might possibly be killed at the same instant by the same flash of lightning, but there does not appear to be any such case in the books.

Persons perishing by the same calamity.

In all ordinary cases, therefore, the survivorship must be a question of evidence, or of presumption from the circumstances. There is not, however, any presumption from age or sex as to the survivorship of one of several persons who perish by the same calamity; as, for instance,

Must depend upon evidence in all cases.

(*d*) *In the goods of Norris*, 1 S. & T. 6; 27 L. J., P. & M. 4. See further, as to presumptive proof of death, *In the goods of Turner*, 3 S. & T. 476; 33 L. J., P. & M. 180; *In re Phene*, L. R., 5 Ch. App. 139; 39 L. J., Ch. 316; 22 L. T. 111; 18 W. R. 303; *In re Lewis*, L. R., 6 Ch. App. 356; 40 L. J., Ch. 602; 24 L. T. 533; 19 W. R. 617; *Hickman v. Upsall*, L. R., 20 Eq. 136; 23 W. R. 776; *In re Hanley*, 25 W. R. 427; *In re Walker*, L. R., 7 Ch. 120; 41 L. J., Ch. 219; 25 L. T. 775; 20 W. R. 171; *In re Rhodes, Fraser v. Renton*, 28 L. T., N. S. 392; *Prudential Assurance Co. v. Edmonds*, 2 App. Cas. 487; *Risley v. Shepherd*, 21 W. R. 782; *Prosser v. Bank of England*, L. R., 13 Eq. 611; 41 L. J., Ch. 327; 26 L. T. 60; 20 W. R. 362.

(*e*) See *In the goods of Selwyn*, 3 Hagg. 749; *Satterthwaite v. Powell*, 1 Curt. 705; *Underwood v. Wing*, 23 L. J., Ch. 982; and on appeal to H. of L., 24 L. J., Ch. 293.

Presumption of death. where, in cases of death by drowning, one man is more robust than another, or a woman is weak and delicate, and her husband is a strong swimmer (*b*); for in such accidents the battle is not always to the strong.

The following cases will illustrate the above doctrines:

Examples. Where a man had left a will bequeathing all his property to his wife, and he, his wife and child, were drowned together at sea, administration with the will annexed was granted to the next of kin of the husband as dead, a widower, there being nothing to show that the wife survived him (*c*).

Husband, wife, and children perishing by same calamity: *Satterthwaite v. Powell*, per Sir H. J. Fust. In *Satterthwaite v. Powell* (*d*), where a man, his wife, and four children, were drowned in a vessel which was lost in the Bristol Channel, and every one on board perished; Sir Herbert Jenner Fust said: "The principle has been frequently acted upon that where a party dies possessed of property, the right to that property passes to his next of kin, unless it be shown to have passed to another by survivorship. Here the next of kin of the husband claims the property which was vested in his wife; that claim must be made out; it must be shown that the husband survived. The property remains where it is found to be vested, unless there be evidence to show that it has been divested. The parties in this case must be presumed to have died at the same time, and there being nothing to show that the husband survived his wife, the administration must pass to her next of kin."

Killed in Cawnpore massacre. Where a man, his wife, and only child, an infant, were killed in the massacre at Cawnpore in June, 1857, leaving no will, and there was no evidence as to which of them died first, the Court granted administration of the man's personal estate, as having died a widower, to his mother, as his next of kin (*e*). And, again, in another case, under

(*b*) See *Taylor v. Diplock*, 2 Phill. 261.

(*c*) In the goods of *Murray*, 1 Curt. 596.

(*d*) 1 Curt. 705.

(*e*) In the goods of *Wainwright*, 1 S. & T. 257; 27 L. J., P. & M. 2.

very similar circumstances, and about the same time, administration was granted to the next of kin, there being no reason to believe that, in the massacre, the wife survived her husband (f). Presumption of death.

Where a husband and wife were killed in a railway collision, and there was no evidence that the one had survived the other, Sir C. Cresswell said: "Where there is no evidence that one survived the other, the next of kin of each is entitled to a grant of administration. In this case the children of the deceased, as they are infants, must elect a guardian to whom the grant may be made" (g). In railway collision.

Where a man, with his wife and three children, perished in a shipwreck, and there was no evidence of survivorship, the Court granted administration of his estate, as having died a widower, to the natural grandfather of the surviving children, and directed that the administrator's oath should state that there was no reason for believing that the wife had survived her husband (h). In shipwreck.

In a recent case of *In the goods of G. C. Alston and E. D. Alston*, March 8, 1892, Butt, P., on the authority of *Underwood v. Wing*, held that there was no presumption of law as to survivorship where husband and wife were drowned together.

(f) *In the goods of Ewart*, 1 S. & T. 258; 27 L. J., P. & M. *Underwood v. Wing*, ante, p. 347, n. (e).

(g) *In the goods of Wheeler*, 31 L. J., P. M. & A. 40. See also (h) *In the goods of Grinstead*, 21 L. T. 731.

CHAPTER XXII.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION IN
CONTENTIOUS BUSINESS.

PARTIES.

Parties—
practice as to.

UNDER the head of the contentious business of the Probate Division are included all matters and proceedings in a probate action from the issuing of the writ of summons down to final judgment and execution.

As we have already seen, the subject of summonses and motions belongs partly to contentious, and partly to non-contentious, business.

C. P. Act,
1857, s. 29.

By the Court of Probate Act, 1857, s. 29, “the practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice of the Prerogative Court.”

But although, as we have seen, the Judicature Acts have had no effect on the non-contentious branch of the jurisdiction of the Probate Division (*a*), the practice of that division in contentious business is now mainly regulated by the Rules and Orders of the Supreme Court, 1883.

Jud. Act,
1875, s. 18.

We say “*mainly*,” because it is provided by sect. 18 of the Judicature Act, 1875, that “all rules and orders of Court in force at the time of the commencement of this Act in the Court of Probate . . . except so far as they are expressly varied by the first schedule hereto or by rules of Court made by Order in Council before the com-

(*a*) *Ante*, p. 332; *In the goods of Tomlinson*, 6 P. D. 209; 50 L. J., P. D. & A. 74; 30 W. R. 61.

mencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively, until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act.” Jud. Act, 1875, s. 18.

And by sect. 21, “save as by the principal Act, or this Act, or any rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act, or this Act, transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act, or this Act, or with any rules of Court, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred if the principal Act and this Act had not passed.” Ibid. s. 21.

By Order I. rule 1 (R. S. C. 1883), “all actions which, previously to the commencement of the principal Act, were commenced by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.” Order I. r. 1.
Commence-
ment of
action.

And by Order II. rule 1, “every action in the High Court shall be commenced by a writ of summons (for a form of which, see *post*, Appendix), which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.” Order II. r. 1.
Writ of
summons.

It will be seen, therefore, that what was formerly termed a “*probate suit*” is now termed a “*probate action*,” and is commenced by writ of summons, instead of citation, although the preliminary procedure with respect to entering Probate
action,
what is.

or warning of *caveats* (b) is not affected by the Judicature Acts; and it should also be remembered that "*citations*" are only abolished for the purpose of initiating an action. They are still extensively used in probate matters, both in contentious and non-contentious business (c).

Therefore the "*Contentious Business*" does not commence until the issuing of the "*writ of summons*."

Ord. LXXI.
r. 1.

By Order LXXI. r. 1, "'probate actions' include actions and other matters relating to the grant or recall of probate, or of letters of administration other than common form business" (d).

Probate
actions,
what are.

There are three forms of actions in the Probate Division: (1) actions for *proving wills in solemn form of law*, or probate actions; (2) administration actions—commonly spoken of as "interest suits"; and (3) actions for the revocation of probate, or letters of administration."

Probate in
solemn form.

The question in actions for proving wills in solemn form generally is, whether a will or other testamentary paper is, or is not, in whole or in part, valid as a testamentary instrument, which depends on a variety of considerations already dealt with in the early chapters of this work (e).

Administra-
tion actions.

The question in administration actions is, which of two or more claimants is entitled to a grant of administration (f).

Revocation
of grants.

Actions for the revocation of grants are instituted for the purpose of setting aside a grant of probate in common form or of letters of administration, already made.

Parties to
probate
actions.

Parties to probate actions may be classed under three heads:

1. Those interested in a testamentary paper, as executors, legatees, &c.;
2. Those interested in the estate by reason of their having been connected with the deceased either by ties

(b) See *post*, p. 374.

p. 1061.

(c) See *post*, p. 411.

(e) *Ante*, pp. 10—101.

(d) See *Annual Practice*, 1892,

(f) *Ante*, pp. 199—233.

of blood or marriage, as the next of kin, heir-at-law, widow, &c.; Parties to probate actions.

3. Those not so connected, who nevertheless have, or pretend to have, a claim on the estate as creditors, &c.

Parties to probate actions are the same now as they were before the passing of the Judicature Acts; for by the 34th section of the Judicature Act of 1873 (36 & 37 Vict. c. 66) (*g*), Jud. Act, 1873, s. 34.
Parties to probate actions. “There shall be assigned to the Probate, Divorce, and Admiralty Division of the said High Court—(1) all causes and matters pending in the Court of Probate . . . (2) all causes and matters which would have been within the exclusive cognizance of the Court of Probate if this Act had not passed.”

And by sect. 11, sub-sect. 3, of the Judicature Act, 1875 (38 & 39 Vict. c. 77), Jud. Act, 1875, s. 11, sub-s. 3. “subject to rules of Court, a person commencing any cause or matter shall not assign the same to the Probate Division, unless he would have been entitled to commence the same in the Court of Probate if this Act had not passed.”

By sect. 100 of the Judicature Act of 1873, the word Jud. Act, 1873, s. 100.
Party. “‘party’ shall include every person served with notice of or attending any proceeding, although not named on the record.”

“‘*Plaintiff*’ shall include every person asking any relief Plaintiff. otherwise than by way of counterclaim as a defendant against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.”

“‘*Defendant*’ shall include every person served with Defendant. any writ of summons or process, or served with notice of or entitled to attend any proceedings” (*h*).

By Order XVI. r. 1 (*i*), “All persons may be joined Ord. XVI.
r. 1.
Joint, several, as plaintiffs in whom the right to any relief claimed is

(*g*) See Annual Practice, 1892, PARTIES CITED TO SEE PROCEED-
p. 48. INGS, see *post*, pp. 369 *et seq.*

(*h*) See Annual Practice, 1892, (*i*) See Annual Practice, 1892,
p. 76. As to INTERVENEES AND pp. 306—381.

Ord. XVI.
r. 1.
and alterna-
tive claims by
plaintiffs.

alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct."

R. 2.
Substitution
of other per-
son for wrong
plaintiff.

By r. 2, "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

R. 3.
Counterclaim.
Misjoinder.

By r. 3, "Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and the defendant has set up a counterclaim or set-off, he may obtain the benefit thereof by establishing his set-off or counterclaim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon."

R. 4.
Joint, several,
and alterna-
tive claims
against de-
fendants.

By r. 4, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

R. 5.
Defendant
need not be
interested in
all the relief
claimed.

By r. 5, "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make such order as may appear just to prevent any defendant from being

embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.”

Ord. XVI.
r. 5.

By r. 7, “Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.”

R. 7.

Plaintiff in doubt as to person from whom redress is to be sought.

By r. 9, “Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.”

R. 9.

Numerous persons.

By r. 10, “Subject to the provisions of the Acts and these rules, in all probate actions the rules as to parties, in use in the Court of Probate previously to the commencement of the principal Act, shall continue to be in force.”

R. 10.

Probate actions.

It may be well to observe here that, in all actions in the Probate Division, every person having or pretending to have an interest in the estate of the deceased must be brought before the Court in some way, otherwise any decree of the Court made in such actions will not bind them, and it is often simpler and cheaper to make such persons parties by putting them on the record as plaintiffs or defendants, rather than by citing them to see proceedings, as to which see *post*, pp. 370 *et seq.*

All parties in probate actions must be brought before the Court.

By r. 11, “No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs

R. 11.

Misjoinder and non-joinder.

Ord. XVI.

r. 11.

Striking out
and adding
parties.

Consent of
plaintiff or
next friend.

or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

R. 12.

Application to
strike out, &c.

By r. 12, "Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

R. 13.

Where defen-
dant added.

By r. 13, "Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the Court or a judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served."

R. 16.

Actions by
married
women and
infants.

By r. 16, "Infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose. Married women may sue and be sued as provided by the Married Women's Property Act, 1882" (*k*).

R. 17.

Lunatics and
persons of un-
sound mind.

By r. 17, "Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the principal Act have sued as plaintiffs or

(*k*) The old probate practice as to guardians has hitherto been followed in probate actions.—[D.]

would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose.”

By r. 18, “An infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian shall be necessary, but the solicitor applying to enter such appearance shall make and file an affidavit in the Form No. 8 in Appendix A., Part II. (l), with such variations as circumstances may require.”

By r. 19, “Every infant served with a petition or notice of motion, or summons in a matter, shall appear on the hearing thereof by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last rule mentioned.”

By r. 20, “Before the name of any person shall be used in any action as next friend of any infant, or other party, or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the Central Office, or in the District Registry if the cause or matter is proceeding therein” (m).

By r. 21, “In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the consent of the Court or a judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party

(l) See *post*, Appendix. An application for a guardian *ad litem* is made in chambers. See note (k), *supra*.—[D.]
 (m) See note (k), *supra*.—[D.]

Ord. XVI.
r. 21.

were under no disability and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy."

R. 22.
Suing or
defending as
pauper.

By r. 22, "Any person may be admitted in the manner heretofore accustomed to sue or defend as a pauper on proof that he is not worth 25*l.*, his wearing apparel and the subject-matter of the cause or matter only excepted."

R. 23.
Case to be
laid before
counsel.

By r. 23, "A person desirous of suing as a pauper shall lay a case before counsel for his opinion, whether or not he has reasonable grounds for proceeding."

R. 24.
Affidavit by
party or
solicitor that
case is true.

By r. 24, "No person shall be permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or his solicitor, that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the Court or judge or proper officer to whom the application is made, and no fee shall be payable by a pauper to his counsel or solicitor."

R. 25.
No fees
payable.

By r. 25, "A person admitted to sue or defend as a pauper shall not be liable to any court fee."

R. 26.
Counsel and
solicitor may
be assigned.

By r. 26, "Where a person is admitted to sue or defend as a pauper, the Court or a judge may, if necessary, assign a counsel or solicitor, or both, to assist him, and a counsel or solicitor so assigned shall not be at liberty to refuse his assistance unless he satisfies the Court or judge that he has some good reason for refusing."

R. 27.
No fees to be
taken from
pauper.

By r. 27, "Whilst a person sues or defends as a pauper no person shall take, or agree to take, or seek to obtain from him, any fee, profit, or reward, for the conduct of his business in the Court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward shall be guilty of a contempt of Court" (*h*).

(*h*) This rule as to fees applies to every proceeding in the High Court except proceedings in Divorce,

which are specially excepted from the Rules of the Supreme Court by Ord. LXVIII. r. 1 (*d*). It has,

By r. 28, "If any person admitted to sue or defend as a pauper gives, or agrees to give, any such fee, profit, or reward, he shall be forthwith dispaupered, and shall not be afterwards admitted again in the same cause to sue or defend as a pauper."

Ord. XVI.
r. 28.

If pauper agrees to pay fees he is to be dispaupered.

By r. 29, "No notice of motion shall be served or summons issued, and no petition shall be presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor."

R. 29.

Notice of motion, &c., on behalf of—how to be signed.

By r. 30, "It shall be the duty of the solicitor assigned to a person admitted to sue or defend as a pauper to take care that no notice is served, or summons issued, or petition presented, without good cause."

R. 30.

Duty of solicitor of.

By r. 31, "Costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the Court or a judge shall otherwise direct, be taxed as in other cases."

R. 31.

Costs to be taxed.

The following are the rules of the Probate Court, 1862 (Contentious Business), applicable to suits *in formâ pauperis*:—

Probate Rules.

Suits *in formâ pauperis*.

R. 23. "Any person desirous of prosecuting a suit *in formâ pauperis* is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding."

R. 23, C. B.

R. 24. "No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the judge; and to obtain such order, the case laid before counsel, and his opinion thereon, with an affidavit of the party, or of his or her proctor, solicitor, or attorney that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth 25*l.* after payment of his or her just debts, save and except his or her

R. 24, C. B.

therefore, been decided by the present Attorney-General, Sir Richard Webster, that both counsel and solicitors appearing for a pauper in

a divorce proceeding may take fees. See Law Times, November 29th, 1890.

Probate
Rules.

Suits in *formâ
pauperis*.

R. 25, C. B.

wearing apparel, shall be produced at the time such application is made."

R. 25. "Where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid."

A person suing in *formâ pauperis*, who has had counsel assigned to him by the Court, cannot appear by another counsel until he has been dispaupered (*i*).

A plaintiff, who, through poverty, is unable to prosecute a suit instituted by him, should apply for leave to continue the suit in *formâ pauperis*. If he does not, and the suit is dismissed for non-prosecution, he will not afterwards be allowed to re-commence it in *formâ pauperis* (*k*).

Ord. XVI.
r. 39.

Conduct of
action.

By r. 39, "The Court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question."

R. 41.

Order for
liberty to
attend not
necessary.

Appearance
to be entered.

By r. 41, "It shall not be necessary for any person served with notice of any judgment or order to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend the proceedings upon entering an appearance in the Central Office in the same manner, and subject to the same provisions, as a defendant entering an appearance."

R. 44.

Service of
notice of
judgment on
infants, &c.

By r. 44, "Notice of a judgment or order on an infant or person of unsound mind not so found by inquisition shall be served in the same manner as a writ of summons in an action."

(i) *Hamer v. Boreham*, 1 S. & T.
26; 27 L. J., P. & M. 107.

(k) *Cathrell v. Jeffree*, 33 L. J.,
P. & M. 178; 10 Jur., N. S. 445.

By r. 46, "If in any cause, matter, or other proceeding it shall appear to the Court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons (if any) as the Court or judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding."

Ord. XVI.
r. 46.

Where no legal personal representative, Court may appoint or dispense with.

By Order XVII. r. 1 (1), "A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death."

Ord. XVII.
r. 1.

Change of parties by death, &c.

Action not abated where cause of action continues.

By r. 2, "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice in such manner and form as hereinafter prescribed, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the cause or matter as may be just."

R. 2.

In case of marriage, &c., or devolution of estate, Court may order successor to be made a party or served with notice.

(1) See Annual Practice, 1892, pp. 381—393.

Ord. XVII.

r. 4.

Order to
carry on pro-
ceedings.

By r. 4, "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."

R. 5.

Service of
order to con-
tinue action.

By r. 5, "An order obtained as in the last preceding rule mentioned shall, unless the Court or judge shall otherwise direct, be served upon the continuing party or parties, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons."

R. 6.

Application
to discharge
order by per-
son under no
disability or
having a
guardian.

By r. 6, "Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the cause or matter, shall be served with such order as in Rule 4 mentioned, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the service thereof."

R. 7.

By person
under dis-

By r. 7, "Where any person being under any disability other than coverture, and not having a guardian *ad litem* in the cause or matter, is served with any order as in Rule 4

mentioned, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian *ad litem* for such party, and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned person.”

Ord. XVII.
r. 7.
ability,
having no
guardian.

By r. 8, “When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or the person entitled to proceed) to proceed within such time as may be ordered: and in default of such proceeding, judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued; and in such case, if the plaintiff has died, execution may issue as in the case provided for by Order XLII. r. 23” (*m*).

R. 8.
Death of sole
plaintiff or
defendant.

By r. 9, “Where any cause or matter becomes abated, or in the case of any such change of interest as is by this Order provided for, the solicitor for the plaintiff or person having the conduct of the cause or matter, as the case may be, shall certify the fact to the proper officer, who shall cause an entry thereof to be made in the cause-book opposite to the name of such cause or matter.”

R. 9.
Solicitor of
plaintiff to
give notice of
abatement.

By r. 10, “Where any cause or matter shall have been standing for one year in the cause-book marked as ‘abated,’ or standing over generally, such cause or matter at the expiration of the year shall be struck out of the cause-book.”

R. 10.
Abated cause,
&c., to be
struck out.

Under the term “parties to actions” in the Probate Division are included, besides plaintiffs and defendants, interveners and parties cited to see proceedings.

By rule 4, Probate Rules (Contentious Business), “executors or *other parties* who, previous to the passing of the C. P. Act, 1857, might prove wills in solemn form of law,

Probate
Rules.
R. 4, C. B.

Probate
Rules.
Rule 4, C. B.
Who may
prove.
Executors and
others.

shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect as heretofore."

The word "executor" includes any kind of executor, whether nominate, according to the tenor, delegate or substituted, in fact any person to whom *probate* in common form can be granted.

The words "*or other parties*" refer to parties to whom, on failure of the executor to appear, or on his refusal to act after appearance, or on renunciation, the Court would grant administration with the will annexed.

Rule 5, C. B.
Who may put
executors, &c.
on proof.

By rule 5, C. B., "next of kin and others who, previously to the passing of the said Act, had a right to put executors or parties entitled to administration with the will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs, as heretofore."

Right of next
of kin to put
executor to
proof in
solemn form.

Next of kin are entitled to put executors on proof of a will in solemn form, for the obvious reason that if the proof of the will fails, they become entitled in distribution.

A next of kin, however, *quà* next of kin, has no right to oppose a testamentary paper, without showing some interest, however small (*l*).

"*Other persons,*" who
are.

The words "*and others*" used in the rule refer to those persons who, without being next of kin, have interests which are affected by the will, as, for instance, the executor or legatee of a prior will or their representatives.

It does not include the executor himself after he has proved the will in common form; for an executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will; he has no right, therefore, to cite the persons interested under it to propound it in solemn form, or show

cause why the probate in common form should not be revoked; the executor of an executor is in this respect in the same position as the original executor (*m*). Probate Rules.

An executor of a former will has the same right as a next of kin to put an executor of a later will upon proof in solemn form, and to interrogate his witnesses (*n*).

By rule 6, C. B., "parties who, previously to the passing of the said Act, had a right to intervene in a cause, may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore." Rule 6, C. B.

An "intervener" is a party who voluntarily interposes. A party who is brought into the contest by being cited is not an intervener. Intervener, what is.

Any party whose interest is affected is entitled to oppose the grant of probate.

He must, however, have some interest; it may be very small; even the bare possibility of an interest is sufficient. Party opposing will must have some interest.

But a party who has no interest cannot be permitted to intervene in a cause (*o*).

Therefore, before a person is permitted to contest a will he may be called upon by the propounder to show his interest; but when two contest a will neither can call upon the other first to show his interest (*p*). Interest must be shown.

Where an intervener was cited to appear by the defendants, the unsuccessful parties, and had been charged by them with procuring the will by undue influence, the Court, in pronouncing for the will, condemned the de- Defendant condemned in intervener's costs.

(*m*) *In the goods of Chamberlain*, L. R., 1 P. & D. 316; 36 L. J., P. & M. 52; 16 L. T. 97; 15 W. R. 680.

29 L. J., P. & M. 130; *Wright v. Rutherford*, 2 Cas. temp. Lee, 266; *Brotherton v. Hellier*, 1 Cas. temp. Lee, 599.

(*n*) *Boston v. Fox*, 4 S. & T. 199.

(*p*) *Hingston v. Tucker*, 2 S. &

(*o*) *Kipping v. Ash*, 1 Rob. 270; 4 No. of Ca. Ecc. 177. See also *Crispin v. Doglioni*, 2 S. & T. 17; ,

T. 596; 31 L. J., P. & M. 91; 7 L. T. 337.

Interveners, &c. defendants in the costs of the intervener, as well as of the executors (*q*).

Party having no interest. A party having no interest in a will cannot propound it (*r*).

Creditor, right of to oppose will. "A creditor has only a right to have a *constat* of the estate of the deceased to see whether there are assets sufficient to pay the debts, but he cannot controvert the validity of a will. For it is indifferent whether he shall receive his debt from an executor or an administrator; and if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense, and delay to executors" (*s*).

"But when administration has been granted to a creditor he may oppose a will: he is the same for this purpose as the next of kin" (*t*).

"And he may contest a will without costs; because he is the appointee of the Court, and defends in that character, and does not appear simply as a creditor" (*u*).

Evidence of relationship. A deed executed by the deceased, in which the defendant was described as his sister, was held to be sufficient evidence of relationship to enable her to contest the validity of his will (*x*).

Pleading by intervener. An intervener may plead after issue joined by leave of the Court (*y*). To entitle a person to intervene in a suit for revocation, it is not necessary that he should have had an interest at the time of the death of the deceased. An

(*q*) *Tennant v. Cross*, 12 P. D. 4; 56 L. J., P. D. & A. 74; 57 L. T. 372.

(*r*) *Parton v. Johnson*, L. R., 1 P. & D. 549; 37 L. J., P. & M. 67; 18 L. T. 923; 16 W. R. 1192. See also, on the subject of interest, *Hibben v. Calemhourg*, 1 Phill. 166; *Hillam v. Walker*, 1 Hag. 71.

(*s*) Wms. on Exors. 9th ed. pp. 279, 280; citing *Burroughs v. Griffiths*, 1 Lee, 544; *Menzies v.*

Pulbrook, 2 Curt. 845.

(*t*) *Ibid.* 280; citing *Dabbs v. Chisman*, 1 Phill. 159, 160.

(*u*) *Ibid.*; citing *Menzies v. Pulbrook*, 2 Curt. 851. See also, on the subject of creditors, *In the goods of Newsom*, 2 N. of C. 15.

(*x*) *Smith v. Tebbitt*, L. R., 1 P. & D. 354; 36 L. J., P. & M. 35; 15 L. T. 594.

(*y*) *Jones v. Williams*, 34 L. J., P. & M. 102; 11 Jur., N. S. 288.

interest acquired subsequently by purchase of part of the estate from the administrator is sufficient (z).

There is no limitation as to time in requiring a will to be proved in solemn form (a).

Neither is a party barred from disputing a will by receipt of a legacy (b); but if he desire to dispute a will after having so received his legacy, he must bring the amount of the legacy into Court (c).

“When a will is to be proved in solemn form, it is now, in accordance with the old practice, requisite that such persons as have interest, that is to say, the widow and next of kin of the deceased, to whom the administration of his goods ought to be committed, if he died intestate, should be cited to be present at the probate and approbation of the testament” (d). Such was the practice of the Prerogative Court, which is the groundwork of the present system.

By sect. 61 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is enacted that, “where proceedings are taken under this Act for proving a will in solemn form or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin or others having or pretending

Intervener in suit for revocation.

Right to prove will in solemn form.

Not barred by lapse of time, or by receipt of a legacy.

Parties to be cited.

Widow and next of kin.

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 61.

Where a will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

(z) *Lindsay v. Lindsay*, L. R., 2 P. & D. 459; 42 L. J., P. & M. 32; 27 L. T. 592; 21 W. R. 272.

(a) *In the goods of Topping*, 2 Robert. 620.

(b) *Merryweather v. Turner*, 3 No. of Ca. Ecc. 55; *Core v. Spencer*, 1

Add. 374.

(c) *Bell v. Armstrong*, 1 Add. 374; *Braham v. Burchell*, 3 Add. 256.

(d) *Wms. on Exors.*, 9th ed. p. 275.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 61.

Citation
of parties
having or
pretending
interest in
realty.

interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court."

But where the parties interested in establishing an intestacy were the widow of the testator and his brother, the heir-at-law, and the widow was a lunatic confined in an asylum in Australia, and the heir-at-law had already appeared as a party in the suit, the Court refused to order the widow to be cited to see proceedings (*e*).

Citation to
see proceed-
ings.

Practice not
altered by
Judicature
Acts.

The practice of the Probate Division as to citations to see proceedings has not been altered by the Judicature Acts and the rules therein contained, and therefore, in order that a decree in a testamentary suit may bind the heir-at-law or devisees of real estate, a citation should be taken out against them under 20 & 21 Vict. c. 77, s. 61, notwithstanding the rules of the Supreme Court as to the joinder of third parties (*f*).

C. P. Act, 1857
(20 & 21 Vict.
c. 77), s. 24.

Where an executor propounding a will cited the next of kin to see proceedings, and they appeared, and there was no reason to believe that there were any other next of kin, the Court made an order upon them, under 20 & 21 Vict. c. 77, s. 24, to attend before the registrar to be examined as to the state of the family (*g*).

Heir-at-law,
devisees, &c.

Previous to the passing of the C. P. Act, 1857, Courts of Probate never pretended to have any jurisdiction over realty. But now, under the operation of sect. 61 and following sections of the C. P. Act, 1857, 20 & 21 Vict. c. 77, "the heir-at-law, devisees and other persons having "or pretending interest in the real estate affected by the "will" are to be cited or summoned as though they were next of kin and the will affected personalty. They also

(*e*) *Ward v. Huckle*, 12 P. D. 110; 56 L. J., P. D. & A. 110; 57 L. T. 495; 35 W. R. 736.

(*f*) *Kennaway v. Kennaway*, 1 P. D. 148; 45 L. J., P. & M. 86; 34

L. T. 854; 24 W. R. 586.

(*g*) *Shepherd v. Beetham*, L. R., 2 P. & D. 384; 41 L. J., P. & M.

44.

may become parties or intervene for their respective interests. The penalty on this indulgence is that they are bound by the decree of the Court, whether for or against the will. The 63rd section provides that where a deceased had no real estate or power to appoint to real estate beneficially, or where the will does not affect real estate, these persons need not be cited.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 63.

By Rule 78, Probate Rules, Contentious Business, "Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorizing him to cite the heir or heirs-at-law, or other persons having or pretending interest in such real estate, to see proceedings; and the judge or registrar, on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, will make an order authorizing the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid: Provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires" (h).

Probate
Rules.
Rule 78, C. B.
Citing heir-
at-law, &c.

Should one of the above parties not be cited, but be desirous of intervening to protect his interest, he then comes within the scope of Rule 6, Contentious Business, and may obtain the leave of the judge or one of the registrars by order on summons as there directed. And by Order XII. r. 23 (R. S. C. 1883), "In probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased."

Interveners.
Rule 6, C. B.
Ord. XII.
r. 23.

But the executor of a will affecting realty cannot be prevented from obtaining probate in common form by a caveat entered by the heir-at-law if he has not been cited (i).

(h) As to the advisability of making the heir-at-law a party, *ante*, p. 357.

(i) *Young v. Ferrie*, 29 L. J., P. & M. 69; 5 Jur., N. S. 1318.

Heir-at-law.

The object of these provisions was to prevent the possibility of a double trial on the same will (*k*).

When to be cited.

"The Court is authorized to cite the heir-at-law in two events only; one being where the validity of the will is actually in contest; the other being where the will, although not in contest, is about to be proved in solemn form by the person who brings it before the Court" (*l*). Therefore, the Court will not authorize the citation of the heir-at-law until a plea has been filed in the suit, or until the next of kin has been already cited to see proceedings (*m*).

But if the party propounding the will will file an affidavit (even before the time for pleading has expired) that he intends to go on and prove the will in solemn form, the Courts will allow the citation to issue (*n*).

Where the executors under the will of a deceased cited the executors named in a codicil to it, as also the other parties interested to propound such codicil, and an appearance had been entered for the executors named in the codicil, but no declaration had been filed, and the bequests in the codicil affected the real estate, the Court ordered the heir-at-law to be cited (*o*).

The Court will sometimes order devisees or the heir-at-law to be cited to see proceedings, although they may be already before it as defendants in the action (*p*).

When a contention arises about a testamentary paper, the Court will not order the assignee of the heir-at-law of the testator to be cited as a person having or pretending interest in the real estate affected by the will (*q*).

(*k*) *Nichols v. Binns*, 1 S. & T. 19; 27 L. J., P. & M. 14.

(*l*) Per Lord Penzance, *Moore v. Holgate*, L. R., 1 P. & D. at p. 102.

(*m*) *Moore v. Holgate*, L. R., 1 P. & D. 101; 35 L. J., P. & M. 46; 14 L. T. 24; 14 W. R. 515; see also *Domville v. Domville*, 4 S. & T. 17; 34 L. J., P. & M. 79; 12 L. T. 54; *Coplestone v. Nicholes*, 33 L. J., P. & M. 57.

(*n*) *Peacock v. Lowe*, L. R., 1 P.

& D. 311; 36 L. J., P. & M. 46; 15 L. T. 634; 15 W. R. 717.

(*o*) *Comer v. Parnell*, 36 L. J., P. & M. 81; 16 L. T. 299.

(*p*) See *Lister v. Smith*, 3 S. & T. 53; 32 L. J., P. & M. 13; 7 L. T. 219; 10 W. R. 429; *Emberley v. Trevanion*, 22 L. J., P. & M. 142; 4 S. & T. 197.

(*q*) *Jones v. Jones*, 7 P. D. 66; 51 L. J., P. D. & A. 93; 46 L. T. 919; 30 W. R. 691; 46 J. P. 472.

Executors propounding a will, disposing of real estate, may issue citation to see proceedings against devisees under a prior will, which is not propounded (*r*). Citing devisees in prior will.

An executor who has proved a will in common form cannot, as such executor, take proceedings to question its validity. He has no right, therefore, to cite the persons under it to prove it in solemn form, or to show cause why the probate in common form already granted should not be revoked (*s*). Executor who has proved will in common form cannot dispute validity of it, or cite parties interested.

A creditor is not to be cited, as he cannot controvert the validity of a will. Creditor not to be cited.

But it is otherwise if he has already had a grant of administration. *Aliter* if he have a grant.

By the Married Women's Property Act, 1882, a married woman may sue and be sued as if she were a *feme sole*.

Subject to any modification by the provisions of Order XVI. (R. S. C., 1883) (*t*), by Rule 74 of the Court of Probate Rules, 1862 (Contentious Business), "A minor may elect a guardian for the purpose of carrying on, defending, or intervening in a suit, in the same manner and subject to the same rules as in respect of non-contentious business, and without having such guardian assigned to him; but guardians are to be assigned to infants (under the age of seven years) for the above purposes by the judge, or by an order of one of the registrars, founded on an affidavit to the effect required for such assignment in non-contentious business" (*u*). Probate Rules, C. B., r. 74.
Guardian *ad litem*.
Minors.
Infants.

This affidavit is regulated by Rule 34 of the Probate Court Rules, 1862, Non-contentious Business, which is in the following terms: "In cases of infants (*i.e.*, under the age of seven years) not having a testamentary guar- R. 34, N.-C. B.

(*r*) *Lister v. Smith*, 3 S. & T. 53; 32 L. J., P. & M. 13; 7 L. T. 219; 10 W. R. 429.

(*s*) *In the goods of Chamberlain*, L. R., 1 P. & D. 316; 36 L. J., P. & M. 52; 16 L. T. 97; 15 W. R. 680.

(*t*) *Ante*, pp. 355 *et seq.*

(*u*) He must elect his next of kin, otherwise there is an assignment. And see Guardianship of Infants Act, 1886, making the mother the guardian where there is no father living.—[D.]

Probate
Rules, 1862,
(N.-C. B.),
r. 34.

Affidavit of
minor as to
appointment
of guardian.

Guardians
minor and
infant.

Court not
bound by
election of
minor as to
guardian.

Guardian *ad*
litem disput-
ing will.

dian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge or of one of the registrars; the registrar's order is to be founded on an affidavit, showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship."

The difference, therefore, is that a minor chooses his guardian, while an infant has his guardian chosen for him by the Court.

In the same manner the minor has to sign and seal an election paper, a form of which is given in the Appendix; the paper also contains an appointment of the solicitor who acts for the minor, and whose duty it is to file the election paper in the registry, which should be done forthwith. The election paper must be witnessed by one witness at least, who must be quite exempt from any interest in the litigation going on.

But the Court is not bound by the election of the minor, especially where he is not in a position to act independently. So the Court refused to appoint the paternal uncle guardian to a minor, for the purpose of instituting a suit on his behalf against the mother, in reference to the validity of the will of the minor's father, without first citing the mother to show cause why such an appointment should not be made (*x*); and in appointing a guardian *ad litem* to an infant, the Court, if it thinks fit, may pass over the next of kin (*y*).

When a will is disputed by a guardian *ad litem* on behalf of infants, the Court has power to inquire whether the suit is for their benefit (*z*).

(*x*) *In the goods of Jenkins*, L. R., 1 P. & D. 690; 38 L. J., P. & M. 72.

(*y*) *Quick v. Quick*, 3 S. & T. 442; 33 L. J., P. & M. 146; 10

L. T. 619; 10 Jur., N. S. 682; 12 W. R. 1119.

(*z*) *Percival v. Cross*, 7 P. D. 234; 52 L. J., P. D. & A. 16; 47 L. T. 353; 31 W. R. 124; 46 J. P. 792.

It must be remembered that, under the Judicature Act, 1873, sect. 24, sub-ss. 6, 7 (a), the Probate Division has concurrent jurisdiction with the other divisions of the High Court. Under this section it was held that "when the will of a married woman is tendered for probate on the ground that she had separate property, and the probate is contested, if the Court is satisfied that there is separate property, it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what that property is."

Jud. Act,
1873, s. 24,
sub-s. 7.
Concurrent
jurisdiction.

"But it is generally the duty of the Court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists."

And, *semble*, where the will is made under a power, if the Court has all the persons interested before it, it ought to decide the question, not only whether there is a power, but whether it is well executed (b). And in a later case the Court allowed the pleadings to be amended, by adding a prayer that the plaintiffs held their shares as trustees for the defendants and the interveners (c).

Powers of
Court as
Court of Con-
struction.

In the very recent case of *Harding v. Sutton* (d), where a woman, married in 1878, made her will in 1882, while still under coverture, purporting to dispose of separate property; the husband did not assent to the making of the will; testatrix died in 1888, and her executor applied for probate; the husband opposed on various grounds, but he chiefly relied on his plea that his late wife had no separate property. After argument, the Court admitted evidence on this point, and pronounced for the will with costs. Butt, J., declined to go further and decide of what the separate property of the testatrix consisted, and the proper destination of such property, as these were especially questions for the Chancery Division.

(a) *Ante*, pp. 8, 9.

(c) *Betts v. Doughty*, 5 P. D. 26;

(b) *In the goods of Tharp*, 3 P. 48 L. J., P. & M. 71; 41 L. T. D. 76; 38 L. T. 867; 26 W. R. 560.

770.

(d) 59 L. T. 838.

CHAPTER XXIII.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION
IN CONTENTIOUS BUSINESS.

CAVEATS.

Caveats. As we have seen, the Judicature Acts have had “no effect
Practice as to, whatever upon the non-contentious branch of the jurisdic-
not altered. tion of the Probate Division” (a), and the practice of the
registry respecting caveats has in no way been affected by
the passing of those Acts.

Probate Rules,
N.-C., P. R.

The subject of caveats seems to find its proper place in
the contentious business of the Probate Division, although
by a head-note to the rules of the Probate Court for non-
contentious business, “Non-contentious business shall in-
clude all common form business as defined by the Court
of Probate Act, 1857 (20 & 21 Vict. c. 77), and the warn-
ing of caveats.”

The rules regulating the practice with regard to caveats
are to be found partly among the rules for “non-con-
tentious business,” and partly among the rules for “con-
tentious business.”

By whom
entered.

Where a grant of probate or letters of administration
has not yet issued, any person intending to oppose such
issuing, does so by entering a caveat.

For what
purpose
entered.

A caveat, however, need not be entered merely for the
purpose of disputing a will. It may be entered for the
purpose of protecting it (b), as the caveator, being entitled

(a) *Per* Hannen, P., *In the goods of Tomlinson*, 6 P. at p. 210.

(b) *Ingram v. Strong*, 2 Phill. 315.

to notice or "warning" before a grant can issue, has thus the opportunity of entering an appearance, and may thereupon *oppose* or *support* the grant as his interest may dictate. Caveats.

By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 53, "Caveats against the grants of probates or administrations may be lodged in the principal registry, or in any district registry, and (subject to any rules or orders under this Act) the practice and procedure under such caveats in the Court of Probate shall, as near as may be, correspond with the practice and procedure under caveats now in use in the Prerogative Court of Canterbury; and immediately upon a caveat being lodged in any district registry, the district registrar shall send a copy thereof to the registrars to be entered among the caveats in the principal registry; and immediately upon a caveat being entered in the principal registry, notice thereof shall be given to the district registrar of the district, if any, in which it is alleged the deceased resided at the time of his decease, and to any other district registrar to whom it may appear to the registrar of the principal registry expedient to transmit the same." C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 53.

The rules applying to caveats are from 59 to 67, Probate Rules, Non-contentious Business; 72 to 78, District Registries; and 7 to 12 of the Contentious Business. Probate
Rules.
N.-C. B. 59
—67; D. R.
72—78; 7—
12 C. B.

For form of caveat, see Form 32, Probate Rules, Non-contentious Business.

By rule 59, Probate Rules, Non-contentious Business, and rule 7, Contentious Business, "Persons intending to oppose the issuing of a grant of probate or administration must personally or by their solicitor enter a caveat in the principal registry or in a district registry: if in the principal registry the person entering the caveat must also insert the name of the deceased in the index to the caveat book." Probate
Rules.
Rule 59,
N.-C. B.,
and Rule 7,
C. B.

Books called the "caveat books" are kept by the clerks of the seats in the principal registry, and by a similar Caveat books.

Caveats.
Practical
directions for
entering.

official in the district registries. They contain printed forms of caveats. [*Fill up the form in the caveat book containing the initial letter of the name of the deceased with the name of the deceased, his last place of abode, the day of his death, and your name and address, together with the date on which you are actually entering it, and sign it, giving again your address.*] If it is in the principal registry, write the name of the deceased in the index to the caveat book, and pay a fee stamp of 1s. If the deceased died in a *Probate district* and you are entering the caveat in the principal registry, two further stamps of 1s. each are required, one to be affixed to a printed notice sent to the registrar of the district, and the other transmitted to him in respect of entering it.

Receipt for
caveat.

On entering the caveat the officer will give you a receipt, which you must be careful to preserve, as if you afterwards wish to *subduct*, i.e., withdraw your caveat, you must produce this receipt.

Probate
Rules.
Rule 60,
P. R., N.-C.,
and Rule 8,
C. B.

By rule 60, Probate Rules, Non-contentious Business, and rule 8, Contentious Business, "A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time."

Rule 61,
P. R., N.-C.

Rule 61, Probate Rules, Non-contentious Business, provides that the registrars shall send notice immediately on a caveat being entered to any district registrar within whose district the deceased died, or was known to have a fixed place of residence at the time of his death.

Rule 62,
P. R., N.-C.

By rule 62, Probate Rules, Non-contentious Business, "No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in a district registry."

Rule 63,
P. R., N.-C.,
and Rule 9,
C. B.

By rule 63, Probate Rules, Non-contentious Business, and rule 9, Contentious Business, all caveats are to be warned in the principal registry, and the warning is to be left at the place mentioned in the caveat as the address of

the person who entered it. The party who is prevented from taking his grant in consequence of the entering of the caveat takes out what is called a "*warning*." Caveats.

A copy of this document must be served on the party entering the caveat, either *personally* or by post, at the option of the party "*warning*."

If service is to be effected by post, it is done through the registrar.

If no appearance is entered within seven days the grant is allowed to issue, in spite of the caveat, on proper affidavits of the service of the warning and of non-appearance being filed.

Before issuing a grant of probate or administration, the caveat book, which is kept by the clerks of the seat, is searched, and upon the entry of a caveat being discovered, the grant to the applicant is stopped; a form of warning (*d*) is then furnished by the clerk to the applicant, who fills it up according to his case and hands it back to the clerk. It is then sent by the clerk to the registrar, by whom it is signed. Directions
for warning.

This "*warning*" is a notice given by the registrar of the principal registry to the caveator or his solicitor, according to the caveat "*warning*" him within six days after the service of the warning (inclusive of the day of the service) to enter an appearance, or to cause an appearance to be entered for him, in the principal registry, to the caveat which he had previously entered, and to set forth his interest, concluding with a notice that in default of his doing so, the Court will proceed to do all such acts, matters and things as shall be necessary. Warning of—
what is.

At the foot is a statement showing at whose instance the warning is issued from the registry, and what his interest is, and if under a will or codicil, giving the date thereof, and also giving an address within three miles of the General Post Office, where notices, &c. may be served. Form of
warning.

(*d*) For forms of WARNING, see *post*, Appendix.

Caveats.
Appearance
to warning.

Although the six days have elapsed, an appearance may be entered at any time after, provided the grant has not been actually sealed. It is usual to take out a summons for leave to appear if an appearance has not been entered within the six days.

Where
entered.

By Rule 26, Probate Rules, Contentious Business, the appearance must be entered in the principal registry.

Where a caveat had been entered by the person interested under a marriage settlement, "in case the deceased had not duly executed a will," but such caveat was not warned by the party propounding the will: the Court directed that the caveat should be warned, in order that the party who had entered it might, if he thought proper, intervene in the suit (*e*).

Probate
Rules.
Rule 64,
N.-C. B.
Rule 10, C. B.

By rule 64, Probate Rules, Non-contentious Business, and Rule 10, Contentious Business, "it shall suffice for the warning of a caveat for the registrar to send by post a warning signed by himself to the person who entered the caveat."

Rule 65,
N.-C. B.
Rule 11, C. B.

By rule 65, Probate Rules, Non-contentious Business, and Rule 11, Contentious Business, "the warning is to state the name and interest of the party on whose behalf it is issued, and the date of the will or codicil under which he claims (if his claim be by virtue of a testamentary paper), and is to contain an address within three miles of the General Post Office, at which any notice requiring service may be left. The form of warning will be supplied in the registry."

Rule 66,
N.-C. B.

By rule 66, Probate Rules, Non-contentious Business, "before any citation is signed by the registrar, a caveat shall be entered against any grant being made in respect of the estate to which such citation relates, and notice thereof must be sent to any district where the deceased appears to have resided at the time of his death."

Rule 12, C. B. By rule 12, Contentious Business, "upon an appearance

being entered in answer to the warning of a caveat, the matter shall be entered as a cause in the Court book, and the contentious business shall thereupon be held to commence, and the expenses of the entry of such caveat and the warning thereof shall, upon taxation, be considered as costs in the cause.” Probate Rules.

By rule 67, Probate Rules, Non-contentious Business, “in order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, stating the manner of service, and an affidavit of search for appearance, and of non-appearance, must be filed.” Rule 67,
N.-C. B.

By rule 87, Probate Rules, Non-contentious Business, “the time fixed by a warning for entering an appearance shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.” Rule 87,
N.-C. B.

By rule 74, District Registry, “if a caveat is entered in a district registry, the district registrar is at once to send a copy thereof to the principal registry;” and by Rule 77, after entry of a caveat in a district registry, the district registrar is not to proceed with the grant to which it relates “until it has expired or been subducted, or until he has received notice from the principal registry that the caveat has been warned and no appearance given, or that the contentious proceedings consequent on the caveat have terminated.” Rules 74, 77,
D. R.

The effect of the entry of the caveat is to stop all proceedings for the purpose of obtaining a grant of probate or administration, in respect of the goods of the deceased named in the caveat; this continues until the caveat expires, or has been subducted, or is *warned*; and a party desirous of obtaining a grant of probate or administration of the goods of the deceased, must procure the registrar to issue his warning. Papers are received in the registry, but *not given out*, during the existence of a caveat. Effect of.

[*Procure a shilling stamp and take it to the seat of the division letter of name of deceased, and enter the caveat in* Practical directions.

the following form, and take a receipt for the same.] All caveat books are kept at the seats.

[The name of the deceased and the number of this caveat must be entered in the index at the end of the book.]

[Herewrite the name of the registry within the district of which the deceased resided at the time of his death.]

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.
(PROBATE.)

The Principal Registry.

Let nothing be done in the personal estate and effects of Robert Jackson, late of 145, Strand, in the county of Middlesex, stationer, deceased, who died on the 2nd day of December, 1891, at 145, Strand, aforesaid, unknown to James Lynn, of Furnival's Inn, solicitor for parties having interest.

Dated this 16th December, 1891.

(Signed) JOHN GLOVER.

Receipt.

No. 18
A caveat in the estate and effects of, deceased, who died
on, the day of, 18, was this day entered by
of, solicitor.

A. B.

Should it be desired to subduct the caveat the party entering it or his clerk, on producing the receipt, writes in the margin of the caveat "I subduct this caveat," and signs his name.

If deceased had a residence within the limits of a district registry notice of the caveat is sent to such registry.

Fee for entering caveat at principal registry, 1s.

„ notice of entry to district registry, 1s. 6d.

Same fees are charged for subducting.

CHAPTER XXIV.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION
IN CONTENTIOUS BUSINESS.

WRIT OF SUMMONS.

By Order I. r. 1, "All actions which, previously to the commencement of the principal Act, were commenced by writ in the superior courts of common law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the principal Act, were commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or *by citation or otherwise in the Court of Probate*, shall be instituted in the High Court of Justice by a proceeding to be called an action" (a).

Ord. I., r. 1.
Actions.

By sect. 100 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), "cause" shall include any action, suit, or other original proceeding between a plaintiff and defendant; "suit" shall include action; and "'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court; and shall not include a criminal proceeding by the Crown" (b).

Judicature
Act, 1873,
s. 100.
"Action."

And by Order I. r. 2, "All other proceedings in and applications to the High Court may, subject to these rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if these Acts had not been passed" (c).

Ord. I., r. 2.
Proceedings
other than
actions and
interpleader.

(a) See Annual Practice, 1892, p. 191. (b) *Ibid.*, p. 76.
(c) *Ibid.*, p. 193.

Ord. II., r. 1. By Order II. r. 1, "Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made or of the relief or remedy required in the action, and which shall specify the division of the High Court to which it is intended that the action should be assigned" (*d*).

The plaintiff in a probate action cannot include in the writ of summons a prayer for a declaration of legitimacy (*e*).

R. 2. By r. 2, "Any costs occasioned by the use of any forms of writs, and of indorsements thereon, other or more prolix than the forms hereinafter prescribed, shall be borne by the party using the same, unless the Court shall otherwise direct."

R. 3. By r. 3, "The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Forms Nos. 1, 2, 3, and 4 in Appendix A., Part I., with such variations as circumstances may require" (*f*).

R. 4. By r. 4, "No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the Court or a judge."

R. 5. By r. 5, "A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in one of the Forms 5, 6, 7, and 8, in Appendix A., Part I., hereto, with such variations as circumstances may require. Such notice shall be in one of the Forms Nos. 9 and 10 in the same part, with such variations as circumstances may require" (*g*).

R. 8. By r. 8, "Every writ of summons, and also (unless by Date, &c. of writ. any statute or by these rules it is otherwise provided) every

(*d*) See Annual Practice, 1892, pp. 193—198.

(*e*) *Warter v. Warter*, L. R., 15 P. D. 35; 59 L. J., P. D. & A. 45; 62 L. T. 328.

(*f*) For these forms, see *post*, Appendix.

(*g*) For these forms, see *post*, Appendix.

other writ, shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.” Ord. II. r. 8.

By Order III. r. 1 (*h*), “The indorsement of claim shall be made on every writ of summons before it is issued.” Ord. III.
r. 1.

By r. 5, “In probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character.” Time of
indorsement.
R. 5.
Indorsement
in probate
actions.

By Order IV. r. 1 (*i*), “In all cases where a writ of summons is issued out of the Central Office, the solicitor of a plaintiff suing by a solicitor shall indorse upon the writ and notice in lieu of service of a writ the address of the plaintiff, and also his own name or firm, and place of business, and also, if his place of business shall be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, another proper place, to be called his address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice where writs, notices, pleadings, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.” Ord. IV. r. 1.
Address of
plaintiff and
of his solicitor
to be indorsed.

Address for
service.

Name of
principal and
agent.

By r. 2, “In all cases where a writ of summons is issued out of the Central Office, a plaintiff suing in person shall indorse upon the writ and notice in lieu of service of a writ his place of residence and occupation, and also, if his place of residence shall be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, another proper place, to be called his address for service, which shall not be more than three miles from” R. 2.
Plaintiff suing
in person to
indorse
address for
service.

(*h*) See Annual Practice, 1892, (*i*) *Ibid.*, p. 208.
p. 198.

- Ord. IV.
r. 2. the principal entrance of the Central Hall at the Royal Courts of Justice, where writs, notices, pleadings, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him."
- Ord. V.
r. 1. And by Order V. r. 1 (*k*), "In any action other than a probate action, the plaintiff, wherever resident, may issue a writ of summons out of any district registry."
- Plaintiff may issue writ out of any district registry.
R. 2. By r. 2, "Every writ of summons not issued out of a district registry shall be issued out of the Central Office."
- Issue of writs of summons out of Central Office.
It follows, therefore, that the writ of summons in every probate action must issue out of the Central Office in London.
- R. 10.
Preparation of writs. By r. 10, "Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly written and partly printed, on paper of the same description as by these rules directed in the case of proceedings directed to be printed."
- R. 11.
Seal of writ. By r. 11, "Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued."
- R. 12.
Copy of writ left in office. By r. 12, "The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person."
- R. 13.
Entered in cause book. By r. 13, "The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the cause book, which is to be kept in the manner in which cause books are now kept, and the action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such cause books."

(*k*) See Annual Practice, 1892, pp. 211—221.

By r. 14, "Notice to the proper officer of the assignment of an action to any division of the Court shall be sufficiently given by leaving with him the copy of the writ of summons."

Ord. V. r. 14.
Notice to
officer of
assignment
of action.

By r. 15, "The issue of a writ of summons in probate actions shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ."

R. 15.
Affidavit
before pro-
bate writ.

Fill up the writ (form of which can be obtained from the probate registry or any law stationer), and take it, with the requisite affidavit verifying the indorsement, to the clerk of the papers, who will submit them to the registrar. The registrar, approving the affidavit, will sign the certificate on the writ, and return it to the clerk of the papers, from whom the solicitor will then obtain it. The affidavit, properly indorsed, with a 2s. 6d. fee stamp which is not now affixed, is left with the clerk of the papers. The solicitor then takes the writ, with a copy of it in a similar form, to the Central Office, where the one bearing the registrar's signature is kept, and the other copy duly sealed, which then becomes the original writ in the action, returned to the solicitor, who then makes a further copy of it to be left with the clerk of the papers.

Practical
directions.

By Order VI. r. 1, "The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word 'concurrent,' and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force."

Ord. VI. r. 1.
Issue of con-
current writ
within twelve
months.

By r. 2, "A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given,

R. 2.
Service out of
jurisdiction.

Ord. VI. r. 2. out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction."

Ord. VII.
r. 1.
Declaration
by solicitor
whether writ
issued with
his authority.

By Order VII. r. 1 (*l*), "Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge."

Ord. VIII.
r. 1.
Writ to be in
force for
twelve months
only.

Renewal of
writ for six
months by
order of judge
or district
registrar.

By Order VIII. r. 1, "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a judge for leave to renew the writ; and the Court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 18 in Appendix A., Part. I. (*m*), with such variations as circumstances may require; and a writ of summons so renewed shall remain in force and be available to

(*l*) See Annual Practice, 1892, p. 223.

(*m*) See *post*, Appendix.

prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons" (*n*).

Ord. VIII.
r. 1.

By r. 2, "The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes."

R. 2.
Evidence of
renewal.

By r. 3, "Where a writ, of which the production is necessary, has been lost, the Court or a judge, upon being satisfied of the loss, and of the correctness of a copy thereof, may order that such copy shall be sealed and served in lieu of the original writ."

R. 3.
Lost writ.

By Order IX. r. 1 (*o*), "No service of writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance." And by Order XII. r. 18 (*p*), if the defendant's solicitor does not enter an appearance after having undertaken to accept service he is liable to attachment.

Ord. IX. r. 1.
Agreement of
solicitor to
accept service.

By r. 2, "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made; but if it be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise, as may seem just."

R. 2.
Mode of per-
sonal service.

Substituted
service.
Notice for
service.

By r. 3, "When husband and wife are both defendants to the action, they shall both be served, unless the Court or a judge shall otherwise order."

R. 3.
Husband
and wife.

By r. 4, "When an infant is a defendant to the action, service on his father or guardian, or if none, then upon

R. 4.
Service of
writ on
infant.

(*n*) See Annual Practice, 1892,
pp. 226—228.

(*o*) *Ibid.*, p. 229.

(*p*) *Ibid.*, p. 268.

Ord. IX.
r. 4.

the person with whom the infant resides or under whose care he is, shall, unless the Court or judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made or to be made on the infant shall be deemed good service."

R. 5.
On lunatic.

By r. 5, "When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he is, shall, unless the Court or judge otherwise orders, be deemed good service on such defendant."

R. 8.
Service on
corporations,
&c.

By r. 8, "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every writ of summons issued against the inhabitants of a hundred or other like district may be served on the high constables thereof, or any one of them, or, where there is no high constable, on any other acting chief officer of police of the county in which such hundred or district is situate; and every writ of summons issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being a part of a hundred or other like district, on some peace officer thereof: and where by any statute provision is made for service of any writ of summons, bill, petition, summons, or other process upon any corporation, or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, every writ of summons may be served in the manner so provided."

R. 15.
Indorsement
of date of
service within
three days.

By r. 15, "The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made.

“This rule shall apply to substituted as well as other Ord. IX. r. 15. service.”

By Order X. (q), “Every application to the Court or a judge for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.”

Ord. X.
Affidavit for
substituted
service.

By Order XI. r. 3, “In probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or a judge be allowed out of the jurisdiction.”

Ord. XI. r. 3.
Probate
actions.

By r. 4, “Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or judge that the case is a proper one for service out of the jurisdiction under this order.”

R. 4.
Application to
be supported
by evidence.

By r. 5, “Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.”

R. 5.
Limit of time
for appear-
ance.

By r. 6, “When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him.”

R. 6.
Notice in lieu
of writ.

By r. 7, “Notice in lieu of service shall be given in the manner in which writs of summons are served.”

R. 7.
Notice in lieu
of service.
Defendant
foreigner
resident out
of jurisdic-
tion.

If a defendant is a foreigner resident out of the jurisdiction, he must be served with notice of the writ of summons in the action (r).

(q) See Annual Practice, 1892, R., 1 P. D. 426; 45 L. J., P. & M. 44; 34 L. T. 366; 24 W. R. p. 239.

(r) *Beddington v. Beddington*, L. 346.

Ord. XII.
r. 2.

By Order XII. r. 2 (*s*), "Appearances entered in London shall be entered in the Central Office."

R. 3.
Central Office.
Probate and
Admiralty.

By r. 3, "In Probate and Admiralty actions notice of appearances entered shall forthwith be given by the Central Office to the Probate and Admiralty Registries respectively."

R. 8.
Mode of
entering
appearance.
Memorandum
and duplicate.

By r. 8, "A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. He shall at the same time deliver to the officer a duplicate of the memorandum, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return it to the person entering the appearance, and the duplicate memorandum so sealed shall be a certificate that the appearance was entered on the day indicated by the seal."

R. 9.
Notice of
appearance.

By r. 9, "A defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance (Form No. 2, in Appendix A., Part II.) (*t*) to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing served in the ordinary way at the address for service (which, in the case of a writ issued out of a district registry, must be the address for service within the district), or by prepaid letter directed to that address and posted on the day of entering appearance in due course of post, and shall in either case be accompanied by the sealed duplicate memorandum."

R. 10.
Defendant's
address for
service.

By r. 10, "The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and, if the appearance is entered in the Central Office, a place, to be called his address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, and if

(*s*) See Annual Practice, 1892, (t) See *post*, Appendix.
pp. 260—273.

the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district, and where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor."

Ord. XII.
r. 10.

By r. 11, "A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the Central Office, a place, to be called his address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district."

R. 11.
Defendant in person.

By r. 12, "If the memorandum does not contain such address it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a judge, on the application of the plaintiff."

R. 12.
Memorandum irregular; address fictitious.

By r. 13, "The memorandum of appearance shall be in the Form No. 1, in Appendix A., Part II., with such variations as circumstances may require" (*u*).

R. 13.
Memorandum of appearance.

By r. 14, "Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the cause book."

R. 14.
Officer to enter memorandum.

By r. 17, "If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum."

R. 17.
Defendants appearing by same solicitor.

By r. 18, "A solicitor not entering an appearance . . . in pursuance of his written undertaking so to do, shall be liable to an attachment."

R. 18.
Solicitor not entering appearance.

By r. 22, "A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance, he shall not, unless the Court or a judge shall otherwise order, be entitled to any further

R. 22.
Time for appearance.

(*u*) See *post*, Appendix.

Ord. XII.
r. 22.

time for delivering his defence, or for any other purpose, than if he had appeared according to the writ."

R. 23.
Probate
intervention.

By r. 23, "In probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased."

Probate
Rules, C. B.,
r. 6.

The Probate Court Rules (Contentious Business, r. 6) require the order of a judge or registrar for this purpose. The course adopted is for the intervener to enter his appearance in the Central Office. He then takes his affidavit to the registry, where he obtains an order on summons giving him leave to intervene.

Ord. XIII.
r. 1.
Default of
appearance
by infant or
person of un-
sound mind.
Notice of
application.

By Order XIII. r. 1 (*x*), "Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquiry, the plaintiff shall, before further proceeding with the action against the defendant, apply to the Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or judge at the time of hearing such application shall dispense with such last-mentioned service."

Guardian
to infant
declining to
enter appear-
ance.

Where the defendant was a minor resident out of the jurisdiction, and notice of the writ had been served upon her, and upon her guardian nominated by the foreign

Court, but no appearance had been entered on her behalf, and it appeared that her guardian declined to enter an appearance, the Court, holding that the practice was governed by the above rule 1 of Order XIII., and not by rule 74 of the Contentious Rules of the Probate Court, 1862, nominated the official solicitor of the Court to be the defendant's guardian *ad litem*, and ordered that his costs should be part of the costs of the plaintiff, who was the executor propounding the will (*y*).

Guardian to minor refusing to enter.

By r. 12, "In all actions not by the rules of this order otherwise provided for"—among which are probate actions—"in case the party served with the writ . . . does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, . . . the action may proceed as if such party had appeared."

Ord. XIII. r. 12.

Where party does not appear action may proceed.

By Order XIX. r. 1 (*z*), "The following rules of pleading shall be used in the High Court of Justice."

Ord. XIX. r. 1.

By r. 2, "The plaintiff shall, subject to the provisions of Order XX. (*a*), and at such time and in such manner as therein prescribed, deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall, subject to the provisions of Order XXI. (*b*), and at such time and in such manner as therein prescribed, deliver to the plaintiff his defence, set-off, or counterclaim (if any), and the plaintiff shall, subject to the provisions of Order XXIII. (*c*), and at such time and in such manner as therein prescribed, deliver his reply (if any) to such defence, set-off, or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action shall at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by

Rules of pleading.

R. 2. Delivery of pleadings.

Costs of prolix pleadings.

(*y*) *White v. Duvernay*, (1891) P. 290; 60 L. J., P. D. & A. 89.

(*a*) *Ibid.*, pp. 447—452.

(*b*) *Ibid.*, pp. 452—462.

(*z*) See *Annual Practice*, 1892, pp. 401—446.

(*c*) *Ibid.*, pp. 478—481.

Ord. XIX.
r. 2.

such prolixity to be borne by the party chargeable with the same."

R. 3.
Set-off and
counterclaim.

By r. 3, "A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

R. 4.
Pleading to
state material
facts and not
evidence.

By r. 4, "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel or a special pleader they shall be signed by him; and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person."

R. 5.
Forms of
pleading.

By r. 5, "The forms in Appendices C., D., and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be" (d).

R. 6.
Particulars to
be given in
certain cases.

By r. 6, "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful

(d) For these forms, see *post*, Appendix.

default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items, if necessary) shall be stated in the pleading; provided that, if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading.”

Ord. XIX.
r. 6.

By r. 7, “A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.”

R. 7.
Further and
better state-
ment, or
particulars.

Where undue influence is alleged, the names of the persons charged with having exercised it may be ordered to be given, but not the particulars of the acts charged (*e*). This has long been the practice of the Probate Court, and it has been decided that it ought not now to be disturbed.

Nor will the Court order particulars where incapacity is alleged (*f*).

By r. 8, “The party at whose instance particulars have been delivered under a judge’s order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons. Save as in this rule provided, an order for particulars shall not, unless the order otherwise provides, operate as a stay of proceedings, or give any extension of time.”

R. 8.
Summons for
particulars to
operate as
stay—save,
&c.

By r. 9, “Every pleading which shall contain less than ten folios (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed.”

R. 9.
Printing and
writing
pleadings.

(*e*) *Lord Salisbury v. Nugent*, 9 *West*, 4 S. & T. 22; 34 L. J., P. & M. 146.

(*f*) *Hankinson v. Barningham*, 9 P. D. 62; 53 L. J., P. D. & A. 16; 32 W. R. 324; 43 J. P. 24.

P. D. 23; 53 L. J., P. D. & A. 23; 50 L. T. 160; 32 W. R. 221. See also *Harris v. Bradbury*, 30 L. J., P. & M. 112; 10 Jur., N. S. 159; *West v.*

Ord. XIX.
r. 10.
Delivery of
pleadings.

By r. 10, "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor; but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer."

Probate
Rules, C. B.,
r. 110.

By Rule 110, Probate Rules (Contentious Business), "It shall be sufficient to leave all notices and copies of pleadings and other instruments which, by the rules and orders of the Court, are required to be given or delivered to the opposite parties in a cause, or to their . . . solicitors . . . and personal service of which is not expressly required, at the address furnished by such parties respectively."

Ord. XIX.
r. 11.
Marking
pleadings.

By Order XIX. r. 11, "Every pleading shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, the reference to the letter and number of the action, the division to which the judge (if any) to whom the action is assigned belongs, the title of the action, and the description of the pleading, and shall be indorsed with the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor."

R. 13.
Specific
denial.

By r. 13, "Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

R. 15.
Pleadings to
raise all
grounds of
defence or
reply.

By r. 15, "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be,

as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." Ord. XIX.
r. 15.

By r. 16, "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." R. 16.
Departure.

By r. 17, "It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact, of which he does not admit the truth, except damages." R. 17.
Denial to be
specific.

By r. 18, "Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading (if any) subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted." R. 18.
Joinder of
issue.

By r. 19, "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances." R. 19.
Negative
pregnant.

Ord. XIX.
r. 21.

Effect of
documents to
be stated.

By r. 21, "Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material."

R. 22.

Malice, know-
ledge, &c.

By r. 22, "Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."

R. 23.

Notice.

By r. 23, "Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material."

R. 25.

Presumptions
of law.

By r. 25, "Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied. . . ."

R. 26.

Technical
objection.

By r. 26, "No technical objection shall be raised to any pleading on the ground of any alleged want of form."

R. 27.

Striking out
pleadings.

By r. 27, "The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client."

Examples of.

Where pleadings contain irrelevant matter, application should be made at chambers to have it struck out (n).

Where the executors of a will, having called in probate of an earlier will, in their declaration propounded the later will, and alleged that the defendant had surreptitiously obtained probate of the earlier will, knowing of the existence of the later, and that such probate ought to be

(n) *Farlar v. Farlar*, 1 S. & T. 124; 27 L. J., P. & M. 103.

revoked, and the will pronounced invalid, the Court ordered the part of the declaration relating to the earlier will to be struck out (*o*). Striking out pleadings.

Where plaintiff propounded a will dated the 3rd of March, 1862; the defendant pleaded *inter alia* (1) that, subsequently to the alleged execution of the said will, the testator duly executed a will on the 29th of March, 1864; (2) that the will propounded, howsoever executed, was duly revoked by and by virtue of the will of the 29th of March, 1864, and (3) that the will of the 29th of March, 1864, was, subsequently to its execution, destroyed by the deceased with the intention of revoking the same:—The Court held, that the 1st and 3rd pleas were bad, as neither showed that the will propounded was not entitled to probate, and that the words "*howsoever executed*," in the 2nd plea, must be struck out, as, for the purposes of the plea, it must be assumed that the will propounded was duly executed (*p*). Examples.

Where a plaintiff propounded a will of September, 1880, and the defendant counterclaimed to prove a will of May, 1881, and the plaintiff replied (*inter alia*) that testator was not of sound mind when will of May, 1881, was executed, and fifthly, that, if it was duly executed, it was duly revoked by a will of June, 1881, executed when testator was in a similar state of mind:—Held, that the fifth clause ought not to be struck out as embarrassing (*q*).

By Order XX. r. 2 (*r*), "In probate actions the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default; but where the defendant has appeared, the plaintiff shall not be compelled to deliver it until the expiration of eight Ord. XX.
r. 2.
Statement of
claim in
probate
action.

(*o*) *Rosbotham v. Rosbotham*, 2 S. & T. 121; 30 L. J., P. & M. 38; 3 L. T. 557; 9 W. R. 148.

N. S. 982.

(*p*) *Powell v. Powell*, L. R., 1 P. & D. 6; 35 L. J., P. & M. 5; 13 L. T. 566; 14 W. R. 147; 11 Jur.,

(*q*) *Rigg v. Hughes*, 9 P. D. 68; 53 L. J., P. D. & A. 62; 50 L. T. 293; 32 W. R. 355.

(*r*) See *Annual Practice*, 1892, pp. 447—452.

Ord. XX. days after the defendant has filed his affidavit as to
r. 2. scripts."

R. 4. By r. 4, "Whenever a statement of claim is delivered,
Claim beyond the plaintiff may therein alter, modify, or extend his claim
indorsement. without any amendment of the indorsement of the writ."

R. 6. By r. 6, "Every statement of claim shall state specifically
Relief to be the relief which the plaintiff claims, either simply or in the
specifically alternative, and it shall not be necessary to ask for general
stated. or other relief, which may always be given, as the Court
or a judge may think just, to the same extent as if it had
been asked for. And the same rule shall apply to any
counterclaim made, or relief claimed, by the defendant, in
his defence."

R. 7. By r. 7, "Where the plaintiff seeks relief in respect of
Relief several distinct claims or causes of complaint founded upon
founded on separate and distinct grounds, they shall be stated, as far
separate facts. as may be, separately and distinctly. And the same rule
shall apply where the defendant relies upon several distinct
grounds of defence, set-off, or counterclaim founded upon
separate and distinct facts."

A claim to pronounce against the validity of the will of
a married woman who had obtained a protection order,
and a counterclaim to discharge the protection order, may
be included in the same action (s).

R. 9. By r. 9, "In probate actions where the plaintiff disputes
Interest the interest of the defendant, he shall allege in his state-
actions in ment of claim that he denies the defendant's interest."

Probate Divi- "Interest causes," which are now included under the
sion. general term "probate actions," are suits where the legal
Meaning of interest of a person in the estate of the deceased is denied.
term. Such a suit may arise either as a collateral question in a
testamentary cause, in which case it may be tried apart
from the main question at issue between the parties, or as
an original suit, where the right to administration of the
effects of an intestate is disputed.

(s) *Mudge v. Adams*, 6 P. D. 54; *Mahoney v. McCarthy*, (1892) P. 21;
50 L. J., P. D. & A. 49; 44 L. T. 61 L. J., P. D. & A.
185; 29 W. R. 307. See also

For instance, where a party applying for a grant is stopped by a caveat, the caveator is warned; he enters an appearance setting forth his interest, the party applying for the grant then commences an action in the usual way by writ of summons. If the defendant appears to the writ, the plaintiff delivers his statement of claim denying the interest of the defendant, and the pleadings continue, and the action proceeds in the usual way. It is obvious that such an action may arise equally in testamentary causes as in cases of intestacy.

Interest actions in Probate Division.

Meaning of term.

By Rule 37, Probate Rules (Contentious Business), "In a testamentary cause after delivery of the declaration (*now called statement of claim*), the interest of the party to whom it has been delivered cannot be disputed by the party declaring except by leave of the judge."

Probate Rules, C. B., r. 37.

Interest of party cannot be disputed after delivery of statement of claim.

Where defendants entered a caveat in the goods of J. S., and afterwards, upon this caveat being warned by the plaintiff, entered an appearance claiming as universal legatees of J. S.; plaintiff then filed a declaration alleging that J. S. died intestate, leaving the plaintiff his lawful widow. The defendants in their plea propounded a will of J. S., appointing A. B. sole executrix and universal legatee: upon motion by the plaintiff for an order that the defendants should amend their plea, by setting forth in it such matter as would entitle them to administration, with the will of J. S. annexed:—Held, that by filing the declaration without objecting to the appearance, the plaintiff had admitted the defendants' title to set up the will (*t*).

By Rule 61 (Probate Rules, Contentious Business), "In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively."

Probate Rules, C. B., r. 61.

By Rule 62 (Probate Rules, Contentious Business), R. 62, C. B.

(*t*) *Inkson v. Jeeves*, 3 S. & T. 39; 32 L. J., P. & M. 69; 8 L. T. 173; 11 W. R. 350.

Probate
Rules, C. B.,
r. 62.

“In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant.”

Suit by
Queen's
Proctor,
claiming that
deceased died
a bastard.

In a suit for administration, instituted on behalf of the Crown by the Queen's Proctor, who alleges that the deceased died a bastard, &c., a defendant, who claims to be next of kin of the deceased, must in his plea set out his pedigree, but in doing so, particulars as to the time and place of a marriage and the date of a birth need not be alleged. The defendant, in setting out his pedigree, alleged, *inter alia*, that the deceased was the legitimate daughter of Francis Godman Capell by his lawful wife: on motion for an order that the plea should be amended by setting out when, where, and to whom, F. G. C. was married, and the date of the deceased's birth:—Held, that the plea was sufficient (*u*).

Striking out
defence.

In an interest suit, where the real question in dispute was the legitimacy of the plaintiff, on motion to strike out the defence, the Court held that the question was too serious a matter to be decided on motion (*x*).

Order XXI.
r. 6.

Time for
delivering
defence.
Ten days.

By Order XXI. r. 6(*y*), “Where a statement of claim is delivered to a defendant he shall deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge.”

R. 9.

Costs of im-
proper denial
or non-
admission of
acts.

By r. 9, “Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.”

R. 10.

Set-off and
counter-
claim.

By r. 10, “Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall,

(*u*) *Queen's Proc. v. Wallis*, 31 L. J., P. & M. 97. See also *Queen's Proc. v. Williams*, 2 S. & T. 353; 31 L. J., P. & M. 9; *Griffith v. Greenwood*, 19 L. T. 661.

(*x*) *In the goods of Harrington*, 63 L. T. 228.

(*y*) See *Annual Practice*, 1892, pp. 452—462.

in his statement of defence, state specifically that he does so by way of counterclaim.”

Ord. XXI.
r. 10.

By r. 11, “Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.”

R. 11.
Title of
counterclaim.

By r. 12, “Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 2 in Appendix B. (z), or to the like effect.”

R. 12.
Claim against
person not
party.

By r. 13, “Any person not a defendant to the action, who is served with a defence and counterclaim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.”

R. 13.
Appearance
by third
parties.

By r. 14, “Any person named in a defence as a party to a counterclaim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.”

R. 14.
Reply to
counterclaim.

By r. 15, “Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply apply to the Court or a judge for an order that such counterclaim may be excluded, and

R. 15.
Exclusion of
counterclaim.

(z) For this form, see *post*, Appendix.

Ord. XXI.
r. 15.

the Court or a judge may, on the hearing of such application, make such order as shall be just."

R. 18.

Notice in probate actions to cross-examine only.

By r. 18, "In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances, according to the practice of the Court of Probate, before the principal Act came into operation" (a).

Probate Rules, C. B.,
r. 41.

The practice of the Probate Court in this respect was regulated by Rule 41 (Probate Rules, Contentious Business), which provided that, in all cases, the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court.

Plea in abatement.

By r. 20, "No plea or defence shall be pleaded in abatement."

Ord. XXIII.
r. 1.

Reply within three weeks.

By Order XXIII. (b) r. 1, "A plaintiff shall deliver his reply, if any . . . within twenty-one days after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a judge."

R. 2.

Pleading by leave after reply.

By r. 2, "No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then shall be pleaded only upon such terms as the Court or judge shall think fit."

R. 3.

Pleading subsequent to reply.

By r. 3, "Subject to the last preceding rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge."

(a) For cases on this point, see *post*, Chap. XXX.

(b) See *Annual Practice*, 1892, pp. 478-481.

By r. 4, "Where a counterclaim is pleaded, a reply thereto shall be subject to the rules applicable to statements of defence." Ord. XXIII. r. 4.
Reply to counterclaim to be treated as defence.

By r. 5, "As soon as any party has joined issue upon the preceding pleading of the opposite party simply, without adding any further or other pleading thereto, or has made default as mentioned in Order XXVII. r. 13 (c), the pleadings as between such parties shall be deemed to be closed." R. 5.
Joinder of issue.

By r. 6, "No new assignment shall be necessary or used. But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim, or by way of reply." R. 6.
New assignment.

Forms of statements of claim and defence and of reply, suitable to various forms of probate actions, will be found in the Appendix to this work.

Before a plea that the testator did not intend the alleged testamentary instrument to operate as a will can be put on the record, the leave of the Court must be obtained; but it is not necessary to furnish particulars of such plea (d). Plea that testator did not intend document to operate as will.

Where a party relies upon a will of a later date than that propounded, he must set it out in his statement of defence (e). Relying on will of later date.

An executor propounding a will cannot plead in opposition to an earlier will any plea except revocation by the will which he propounds (f). No plea except revocation to earlier will.

A statement of claim propounding a will, made by a person domiciled abroad, should aver in terms that the will was valid according to the law of the foreign country (g). Statement of claim, will of person domiciled abroad.

A plea that the will propounded "is not the will of the deceased," without any other words, is too vague and indefinite (h). Plea bad on account of vagueness.

(c) *Ibid.*, p. 510.

(d) *Harrison v. Kirby*, 17 L. T. 152; 16 W. R. 144.

(e) *Leake v. Hurst*, 30 L. J., P. M. & A. 39; 7 Jur., N. S. 104.

(f) *Parton v. Johnson*, L. R., 1 P. & D. 549; 37 L. J., P. & M.

67; 18 L. T. 923; 16 W. R. 1192.

(g) *Isherwood v. Cheetham*, 2 S. & T. 607; 31 L. J., P. & M. 99; 7 L. T. 250.

(h) *Owen v. Davis*, 3 S. & T.

588; 33 L. J., P. & M. 201; 13 W. R. 88.

Plea of want
of knowledge
and approval.
Irrelevant
plea.

A plea that the testator at the time he executed the will did not know and approve of its contents is good (*i*).

Where a defendant pleaded (1) that deceased duly executed a will of later date whereby he revoked the will set up by the plaintiff, and (2) that he destroyed the second will, intending to revoke it, the Court held that the last plea was irrelevant as being no answer to the plaintiff's claim (*k*).

Undue
influence and
fraud must be
specially
pleaded.

Undue influence and fraud must be specially pleaded; and where it is intended to invalidate a will on the ground of fraud, or of circumstances tantamount to a charge of fraud, there should be a plea on the record alleging that the execution of the will has been obtained by fraud. A plea of undue influence is insufficient to let in a charge of fraud against the party propounding the will (*l*).

Ord. XXV.
r. 1.

By Order XXV. (*m*) r. 1, "No demurrer shall be allowed."

R. 2.
Demurrer
abolished.

By r. 2, "Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial; provided that, by consent of the parties, or by order of the Court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

Points of law
may be raised
by pleadings.

R. 3.
Dismissal of
action.

By r. 3, "If, in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court or judge may thereupon dismiss the action or make such other order therein as may be just."

R. 4.
Striking out
pleading
where no
reasonable
cause of action
disclosed.

By r. 4, "The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in

(*i*) *Hastilow v. Stobie*, L. R., 1 Jur., N. S. 982; 13 L. T. 566; 14 P. & D. 64; 35 L. J., P. & M. 18; 13 L. T. 473; 14 W. R. 211; 11 Jur., N. S. 1039.

(*k*) *Powell v. Powell*, L. R., 1 P. & D. 6; 35 L. J., P. & M. 5; 11

W. R. 147.

(*l*) *White v. White*, 2 S. & T. 504; 31 L. J., P. & M. 215.

(*m*) See Annual Practice, 1892, pp. 484—493.

case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.”

Ord. XXV.
r. 4.

The Probate Division has, apart from Order XXV. r. 3, an inherent jurisdiction, in common with other Courts, to stay proceedings which are frivolous and vexatious and an abuse of the process of the Court.

Inherent jurisdiction to restrain frivolous and vexatious proceedings.

Therefore, where an action was brought to obtain revocation of letters of administration granted in 1798, the plaintiff claiming to represent the next of kin of the intestate, and the defendants being the representatives of the deceased administrator, the Court, having regard to the lapse of time and the fact that defendants did not and could not succeed to the administration sought to be revoked, and the other circumstances of the case, held that the action was frivolous and vexatious, and must be dismissed (*n*).

By Order XXVII. (*o*) r. 1, “If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just.”

Ord. XXVII.
r. 1.

Default of plaintiff in delivering statement of claim.

By r. 10, “In probate actions, if any defendant make default in filing and delivering a defence, the action may proceed, notwithstanding such default.”

R. 10.
Probate action.

By r. 13, “If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading, within the period allowed for that purpose, the pleadings shall be

R. 13.
Close of pleadings on default.

(*n*) *Willis v. Earl Beauchamp*, 11 P. D. 59; 55 L. J., P. D. & A. 17; 54 L. T. 185; 34 W. R. 357. (o) See Annual Practice, 1892, pp. 497—513.

Ord. XXVII. r. 13. deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."

Ord. XXVIII. r. 1. Amendment of indorsement. By Order XXVIII. (*p*) r. 1, "The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

R. 2. Plaintiff may amend without leave, when. By r. 2, "The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared."

R. 3. Defendant with counter-claim or set-off may amend without leave, when. By r. 3, "A defendant who has set up any counterclaim or set-off may, without any leave, amend such counterclaim or set-off at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence."

R. 4. Disallowance of amendment, application for within eight days. By r. 4, "Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a judge to disallow the amendment, or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just."

R. 5. Where one party has amended under rule 2 or 3. By r. 5, "Where any party has amended his pleading under Rule 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time

he then has to plead, or within eight days from the delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.”

Ord. XXVIII.
r. 5.

By r. 6, “In all cases not provided for by the preceding rules of this order, application for leave to amend may be made by either party to the Court or a judge, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.”

R. 6.
Amendment
by leave.

By r. 7, “If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a judge.”

R. 7.
The order
to amend.
Time for.

By r. 8, “An indorsement or pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith, if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended.”

R. 8.
Amendments
to be printed,
when.

By r. 9, “Whenever any indorsement or pleading is amended, the same when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: ‘Amended day of , pursuant to order of dated the of .’”

R. 9.
Date of order
and date of
amendment to
be marked.

By r. 10, “Whenever any indorsement or pleading is amended, such amended document shall be delivered to

R. 10.
Delivery to
opposite
party.

Ord. XXVIII. the opposite party within the time allowed for amending
r. 10. the same."

R. 11.

Clerical
mistakes and
accidental
omissions.

By r. 11, "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal."

R. 12.

General power
to amend.

By r. 12, "The Court or a judge may at any time, and on such terms as to costs or otherwise as the Court or judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

R. 13.

Costs.

By r. 13, "The costs of and occasioned by any amendment made pursuant to Rules 2 and 3 of this order shall be borne by the party making the same, unless the Court or a judge shall otherwise order."

Applications
under this
order on
summons.

Applications under this order must be made on summons to the registrar in the first instance.

Amendment
of pleadings,
when allowed.

A plaintiff who had wrongly described himself was allowed to amend that description on payment of defendant's costs up to time of amendment, exclusive of the costs of entering an appearance (*h*).

Examples of.

Defendants, who disputed the validity of two codicils only, were allowed to amend within a week, by adding pleas against the will, but were ordered to bring a legacy received by one of them into Court, and pay costs of motion (*i*).

Where it is proposed to add a plea after issue joined, the Court must be satisfied on affidavit of the necessity of such plea (*k*).

The inclination of the Court is to allow the record to be amended at the trial by the addition of a new plea, rather than to shut out any defence which might be raised. The

(*h*) *Ridgway v. Abingdon*, 3 S. & 251.

T. 3; 32 L. J., P. & M. 107; 11
W. R. 500.

(*k*) *Twells v. Clarke*, 3 S. & T.
280; 33 L. J., P. & M. 49; 9 L. T.

(*i*) *Ware v. Claxton*, 1 S. & T. 658.

defendants were allowed to put on the record, at the trial, a plea that the will in dispute had been obtained by the undue influence of one of the plaintiffs, subject to the postponement and rehearing of the cause, if required by the plaintiffs, and to the payment by the defendants of all expenses incurred by such postponement (l).

Amendment
of pleadings,
when allowed.
Examples of.

And where a testatrix made a will in 1853, by which she gave her property equally between the plaintiffs, defendants, and interveners, and in the course of the trial of an action in which the plaintiffs propounded the will of 1853, it appeared that in 1874 the testatrix had given instructions for another will, which would have deprived the plaintiffs of all interest in her estate, and evidence was tendered to show that she was prevented by force and threats from executing the proposed will; the Court allowed the pleadings to be amended by adding statements to that effect, and praying for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners (m).

Again, where the onus of proof lay on the defendant, the plaintiff was allowed, after the defendant had been cross-examined, and his case had been closed, to amend the pleadings by adding a defence that the codicil in dispute had been obtained by the defendant's fraudulent misrepresentation, the evidence in support of such defence to be confined to matters arising upon the defendant's cross-examination (n).

A citation is in general a command issued from the principal registry, for the most part ordering the party, to whom it issues and on whom it is served, to do some particular act, as, *e. g.*, to accept or refuse probate or administration. Sometimes the order is to bring in a probate or administration, which is said to have been

Citations, de-
finition of.

(l) *Todd v. Simpson*, 1 S. & T. T. 560.
269.

(n) *Riding v. Hawkins*, 14 P. D.

(m) *Betts v. Doughty*, 5 P. D. 56; 58 L. J., P. D. & A. 48; 60
26; 48 L. J., P. & M. 71; 41 L. L. T. 869; 37 W. R. 575.

Citations, definition of.

granted improperly; sometimes merely to see proceedings, that is, to become a party to a suit, in case the party on whom the citation is served thinks it to his interest. It is sometimes no more in effect than a mere notice.

Must give option of obeying or showing cause.

The order must be in the alternative, viz., to do the act ordered, or to show cause why he should not obey. It was held in the case of *Ackerley v. Parkinson* (o), that if it leaves no option to the party cited but obedience to its requisitions, it is a nullity. The command to bring in a probate certainly leaves no option literally. The probate must be brought in to the principal registry, but as the object is to bring in the probate, in order that its validity may be ascertained, the party cited has an opportunity (if he thinks fit) of showing cause why the probate, when so brought, should not be revoked, so that this still seems substantially to fall within the rule laid down in the above case.

Citation to bring in grant.

Again, if a grant in either form has issued, either of probate or administration, the proper course to pursue is to issue a citation to bring the grant into the registry.

Citations adapted to various cases.

From the preceding it will be seen that citations are of an infinite variety, adapted to the necessities of each case, and all resulting from the principle that every person who has an interest in a grant, whether of probate or administration, has a right to call on every party whose right to the grant precedes his own, to exercise that right, and in the event of the citation being unheeded, the right, as it were, passes on to the party citing.

Origin of citations to accept or refuse grant.

This right is the origin of citations to accept or refuse grants, and may be issued *against* executors or residuary legatees under a will, or against the widow, next of kin, or parties entitled in distribution; where there is no will they may be issued *by* legatees or creditors, or the representatives or nominees of creditors; in fact, by any person whose right is or may be affected by the grant.

Again, if an executor intermeddle with the goods of the

deceased, he may be ordered to bring in the will and then cited to accept or refuse probate; in which case the citation is "to bring in the will, and accept probate thereof" (*p*).

The rules affecting citations are Rules 68, 69, and 70, Probate Rules, Non-Contentious Business, and Rules 13 to 22, Contentious Business, both inclusive.

As citations are only extracted from the principal registry, there is, of course, no reference to them in the district rules, beyond the Rule 79, District Registry, which instructs the district registrar as to that fact, and Rule 80, District Registry, which forbids the issue of a grant from a district registry after a citation, without the production of an office copy of the decree or order of the judge, or of one of the registrars of the principal registry, authorizing the same.

By Rule 13, Contentious Business, "Citations can only be extracted from the principal registry, and no citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the registry;" and Rule 68, Probate Rules, Non-Contentious Business, contains the same provisions as to the filing of the affidavit.

By Rule 14 (abolished since the passing of the Judicature Acts), the contentious business was "to commence with the extracting of a citation." For this citation the writ of summons has been substituted, but, as already stated (*q*), the affidavit formerly required to lead the citation has been preserved and applied to writs of summons in probate actions. The reason that is the foundation of this practice is explained in the following extract from a judgment of Lord Penzance:—

"Citations issued by this Court are not, like writs at common law, at the service of anyone who likes to ask for them. It is an inherent part of the practice of this Court that everyone before extracting a citation should

Citations to accept or refuse grant.

Probate Rules, N.-C. B., 68, 69, 70. C. B., rr. 13—22.

Ibid., District Registry, rr. 79, 80.

Probate Rules, C. B. Rule 13.

Rule 68, P. R., N.-C.

Rule 14, C. B.

Affidavit to lead citation.

(*p*) A subpoena must first issue to bring in the will, and if this be disobeyed a citation follows.—[D.]

(*q*) *Ante*, p. 385.

show in the affidavit which leads the citation the character in which he does it, and thereby the interest which justifies it" (*p*).

Affidavit to lead writ in probate action.

The affidavit to lead the writ of summons is brought to the probate registry, and if approved is sent to the Central Office, from whence the writ now issues. But affidavits to lead citations are subject to the provisions of the rules of practice of the Probate Court.

Citation to issue with writ of summons.

Every suit for revocation of a grant of probate or administration must commence with a citation (which must issue either before or concurrently with the writ of summons), calling on the party who has obtained the grant to bring the same into the registry, "*there to abide the order of the Court.*"

It was decided in *Kennaway v. Kennaway* (*r*), that the practice of the Probate Division as to citing persons interested has been in no way affected by Order XVI. r. 11 (*s*).

Citations to see proceedings.

Citations to see proceedings issue after the writ of summons, and are not binding on the parties cited, unless they are personally served with the citation.

Probate Rules.
Rule 15, C. B.
Caveat to be entered before issue of citation.

By R. 15, Contentious Business, "Before a citation is signed by the registrar a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates, and notice thereof shall be sent to the registrar of any district in which the deceased appears to have had a residence at the time of his death. Such caveat is to be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending. This rule is not to apply to citations to exhibit an inventory, and to render an account, nor to citations to show cause why a bond should not be assigned in order to its being enforced against the sureties."

(*p*) *In the goods of Chamberlain*,
L. R., 1 P. & D. 316; 36 L. J.,
P. & M. 52; 16 L. T. 97; 15
W. R. 680.

(*r*) 1 P. D. 148; 45 L. J., P. & M.
86; 34 L. T. 854; 24 W. R. 586.
(*s*) *Ante*, p. 355.

By R. 16, Contentious Business, "Citations to see proceedings may be extracted from the registry, on the application of any party to the cause." A form is given, No. 4. Citations, practice as to. Rule 16, C. B.

By R. 17, Contentious Business, "Every citation shall be written or printed on parchment, and the party extracting the same, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, a form of which is given, marked No. 5, to the registry, and there deposit the præcipe, and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post Office." Rule 17, C. B.

Forms of præcipe will be found in the Appendix to this work.

By R. 18, Contentious Business, "Citations are to be served personally when that can be done, the party cited being resident in Great Britain or Ireland, but if personal service cannot be effected the direction of the judge or registrars as to the mode of service must be obtained (*t*). Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing such party the original, if required by him so to do." Rule 18, C. B.

Rules 69 and 70, Probate Rules, Non-Contentious Business, are to the same effect. Rules 69, 70, N.-C.

By R. 19, Contentious Business, "Citations may be served upon parties resident out of Great Britain and Ireland by the insertion of the same or of an abstract thereof, settled and signed by one of the registrars, as an advertisement, in such of the morning and evening London newspapers, and if necessary in such local newspapers, and at such intervals as the judge or a registrar may direct: provided that in any case the judge or a registrar may direct a citation to be served personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation" (*u*). Rule 19, C. B.

(*t*) *Potts v. Potts*, 30 L. J., P. & M. 112.

(*u*) Citations must be served personally, unless some other mode of service is directed.—[D.]

Citations,
practice as to.
Service of, on
infants, &c.

Citation by
advertisement.

Rule 20, C. B.
Proceedings
after service
of citation.

No appear-
ance to cita-
tion.

Citations should be served on infants and minors in the presence of their guardians (*u*), and personal service of a citation on the committee of a lunatic is sufficient (*v*).

The proper form of affidavit that a person resident abroad, and cited by advertisement, has no agent in England, is, that he has no attorney, agent, or correspondent in England (*x*).

By R. 20, Contentious Business, "Before a party can proceed after the service of a citation, an appearance must have been entered by or on behalf of the party cited, or an affidavit of personal service, and of non-appearance, must, together with the citation, have been filed in the registry, or if personal service has not been duly effected, the order of the judge, or of one of the registrars in his absence, founded on an affidavit, and giving leave to proceed, must have been obtained. In case the citation has been advertised, the newspapers containing the advertisement, together with the citation and an affidavit of non-appearance, must be filed in the registry."

Where a citation was personally served upon the executor and universal legatee named in a will of the deceased, calling upon him to bring into the registry the probate of it, which had been granted to him, and to show cause why the probate should not be revoked and declared null and void, and the will itself declared null and invalid; the probate was brought into the registry, but no appearance entered to the citation; the Court, although there was no evidence before it as to the invalidity of the will, revoked

(*u*) See *Johnson v. Weldy*, 2 S. & T. 313; 30 L. J., P. & M. 170; 5 L. T. 118; *Brown v. Wildman*, 28 L. J., P. & M. 54; *Cooper v. Green*, 2 Add. 454; *Lean v. Viner*, 3 S. & T. 469; 33 L. J., P. & M. 88; *Lainson v. Naylor*, 2 S. & T. 7; 29 L. J., P. & M. 126; *Sprigg v.*

Banks, 4 No. of Cas. Ecc. 102.

(*v*) *In the goods of Surtees*, 28 L. J., P. & M. 89.

(*x*) *Kenworthy v. Kenworthy*, 3 S. & T. 64; 32 L. J., P. & M. 107; 8 L. T. 470; 11 W. R. 350. See also *Evans v. Burrell*, 4 S. & T. 185; 28 L. J., P. & M. 82.

the probate granted, and ordered probate of an earlier will to issue in common form to the executor named therein (*y*). Citations, practice as to.

An affidavit of service of a citation should identify the citation served: an affidavit of search and non-appearance should state when the search was made; and if two persons have been cited and neither have appeared, it should state that no appearance has been entered by or on behalf of "either of them" (*z*). Appearance.

By R. 21, Contentious Business, "The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service." Rule 21, C. B.

By R. 22, Contentious Business, "If contentious proceedings arise from the service of a citation, the expense of the citation and service thereof shall, upon taxation, be considered as costs in the cause." Rule 22, C. B.

The following steps should be taken by parties desiring to take out a citation in the registry:—

By R. 26, Contentious Business, "All appearances are to be entered in the principal registry in a book provided for the purpose, and kept by the clerk of the papers. The entry must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased." Rule 26, C. B.

And by R. 27, Contentious Business, "The entry of the appearance of a party shall be accompanied by an address within three miles of the General Post Office" (*a*). Rule 27, C. B.

An affidavit upon which an application to cite the persons interested in the real estate affected by a will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England, and at a date since the Wills Act came into operation (*b*). Affidavit in support for leave to cite persons interested in realty.

(*y*) *Crosby v. Noton*, 36 L. J., P. & M. 55; 16 L. T. 153; 15 W. R. 775.

(*z*) *Harenc v. Dawson*, 3 S. & T. 50; 32 L. J., P. & M. 94.

(*a*) For "General Post Office" B.

read "Central Hall of Royal Courts of Justice," O. XII. r. 11.—[D.]

(*b*) *Campbell v. Lucy*, L. R., 2 P. & D. 209; 40 L. J., P. & M. 22; 24 L. T. 231; 19 W. R. 568.

Citations,
practice as to.

It is contrary to the practice of the Court to allow a citation to be served by the party who has extracted it (*b*).

The citation, engrossed on parchment, præcipe, and affidavit, are taken to the clerk of the papers.

The draft citation must be settled by the registrar in every case.

A caveat is then entered, and the citation, after having been duly signed by the registrar, is passed on to the seal-keeper, by whom it is sealed.

Service by ad-
vertisement.

If it has been found impossible to serve a party personally by reason of his residing out of the jurisdiction, or from any other cause, the registrar settles an abstract of the citation, and orders it to be served by advertising in the papers as he shall direct; the usual practice being to advertise in three newspapers at intervals of a fortnight, and such newspapers are subsequently filed.

Appearance
to.

If the citation be to take or refuse a grant, then, in default of appearance, the Court is moved for a grant by the party taking out the citation; but if one of the parties cited appears, and is willing to take the grant, the registrar orders it to go accordingly upon a proper affidavit (*c*).

Entering
appearance.

A solicitor, desiring to enter an appearance to a citation or warning, goes to the clerk of the papers, who provides him with a blank form, which he fills up in draft, and which is afterwards settled by the clerk of the papers, and when so settled entered by the solicitor in a book kept by the clerk of the papers for that purpose, and called the "Appearance Book."

As will be seen on reference to Chapters XI. to XVIII. inclusive, pp. 124—265, citations are constantly required in non-contentious, as well as in contentious, business.

(*b*) *Glyde v. Davie*, 33 L. J., P. M. & A. 184; and see, as to indorsements on affidavit of service, *Goodburn v. Bainbridge*, 2 S. & T. 4;

29 L. J., P. & M. 63; 2 L. T. 439; 8 W. R. 504; *In the goods of Robinson*, 4 S. & T. 43.

(*c*) See form of order in Appendix.

CHAPTER XXV.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION IN
CONTENTIOUS BUSINESS—*continued*.

AFFIDAVIT OF SCRIPTS—DISCOVERY AND INSPECTION—
ADMINISTRATORS AND RECEIVERS PENDENTE LITE.

By Order XXXVIII. r. 10 (a), "Every affidavit used in probate actions shall be filed in the probate registry"; and affidavits of scripts are brought to the probate registry and left there: the scripts are put away in a cover, and the affidavit is marked filed, and stamped.

O. XXXVIII.
r. 10.
Affidavit of
scripts.

By Rule 30, Contentious Business, "The plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant, are respectively to file their affidavits as to scripts, whether they have or have not any script in their possession."

Probate
Rules.
R. 30, C. B.

By Rule 31, Contentious Business, "Every script which has at any time been made by or under the direction of the testator, whether a will, codicil, draft of a will or codicil, or written instructions for the same, of which the deponent has any knowledge, is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith, in the registry."

Rule 31, C. B.

By Rule 32, Contentious Business, "No party to the cause, nor his . . . solicitor . . . shall be at liberty, except by leave of the judge, or of one of the registrars of the principal registry, to inspect the affidavit as to scripts,

Rule 32, C. B.

(a) See Annual Practice, 1892, p. 680.

Affidavit of
scripts.

or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed."

These rules of the Probate Court, and the form of affidavit now in use, will be found in the Appendix.

Scripts, what
are.

"A will, codicil, draft of will or codicil, or written instructions for the same," is a script. If the will, &c., be destroyed, a copy, or any paper embodying the contents, becomes a script, even though not made by or under the direction of the testator.

Every script in the possession of the deponent should be annexed, and should be marked with an alphabetical letter as an exhibit; if not within the possession of the deponent, they should be described, and, if possible, the place where they are, as "now remaining in the principal registry of the Court," or the like.

Pencil writing
on will, &c.

By Rule 75, Contentious Business, "When any pencil writing appears on a will, script, or other document filed in the registry, a fac-simile copy of the will, script, or other document, or of the pages or sheets thereof, containing the pencil writing, must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by an examiner in the registry."

Ord. XXXI.
r. 1.

Discovery by
interrogatories.

By Order XXXI. r. 1 (b), "The plaintiff may at any time after delivering his statement of claim, and a defendant may at or after the time of delivering his defence, without any order for that purpose, and in every cause or matter the plaintiff or defendant may by leave of the Court or a judge, deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories, when delivered, shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that

(b) See Annual Practice, 1892, pp. 535—581.

purpose: Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.”

Ord. XXXI.
r. 1.
Discovery and inspection.

In *Young v. Holloway (a)*, interrogatories for the examination of the defendants, asking them what sums they had received from the testator by way of payment for services, loan, or gift, and whether the universal legatee had since the death of the testator made over any and what part of the property to the other defendants, were ordered to be answered, limiting the answers as to moneys received to any sums paid during the years 1880 to 1883 inclusive.

Interrogatories as to sums of money received from testator.

By r. 2, “In deciding upon any application for leave to exhibit interrogatories, the Court or judge shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions or to produce documents relating to the matter in question, or any of them.”

R. 2.
Matters to be considered on application for leave.

By r. 3, “In adjusting the costs of the cause or matter, inquiry shall, at the instance of any party, be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.”

R. 3.
Costs of interrogatories.

By r. 4, “Interrogatories shall be in the Form No. 6 in Appendix B., with such variations as circumstances may require” (b).

R. 4.
Form of.

By r. 5, “If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of

R. 5.
Corporations or companies.

(a) 12 P. D. 167; 56 L. J., P. D. & A. 81; 57 L. T. 515.

(b) See this form in Appendix.

- Ord. XXXI.
r. 5. any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly."
- R. 6.
Objections to
interroga-
tories by
answer. By r. 6, "Any objection to answering any one or more of several interrogatories, on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer."
- R. 7.
Setting aside
and striking
out interroga-
tories. By r. 7, "Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories."
- R. 8.
Affidavit in
answer, filing. By r. 8, "Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow."
- R. 9.
Printing
affidavit in
answer. By r. 9, "An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding ten folios, be printed, and shall be in the Form No. 7 in Appendix B. (c), with such variations as circumstances may require."
- R. 10.
No exception
to be taken. By r. 10, "No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a judge on motion or summons."
- R. 11.
Order to
answer or
answer
further. By r. 11, "If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *vivâ voce* examination, as the judge may direct."
- R. 12.
Application
for discovery
of documents. By r. 12, "Any party may, without filing any affidavit, apply to the Court or a judge for an order directing any

other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit.”

By r. 13, “The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form No. 8 (*c*) in Appendix B., with such variations as circumstances may require.”

By r. 14, “It shall be lawful for the Court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.”

By r. 15, “Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse

Ord. XXXI.
r. 12.
Discovery and
inspection.

R. 13.
Affidavit of
documents.

R. 14.
Production of
documents.

R. 15.
Inspection of
documents
referred to in
pleadings or
affidavits.

(*c*) See this form in the Appendix.

Ord. XXXI. which the Court or judge shall deem sufficient for not
r. 15. complying with such notice, in which case the Court or judge may allow the same to be put in evidence, on such terms as to costs and otherwise, as the Court or judge shall think fit."

R. 16. By r. 16, "Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 9 (*d*) in Appendix B., with such variations as circumstances may require."

R. 17. By r. 17, "The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books, or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in the Form No. 10 in Appendix B. (*e*), with such variations as circumstances may require."

R. 18. By r. 18, "If the party served with notice under Rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents,

(*d*) See this form in the Appendix.

(*e*) *Ibid*.

such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.”

Ord. XXXI.
r. 18.
Discovery and
inspection.

By r. 20, “If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.”

R. 20.
Premature
discovery.

By r. 21, “If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly.”

R. 21.
Non-compliance with
order for
discovery.

By r. 22, “Service of an order for interrogatories or discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.”

R. 22.
Service on
solicitor of
order for
discovery.

By r. 23, “A solicitor upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.”

R. 23.
Attachment
of solicitor.

By r. 24, “Any party may, at the trial of a cause, matter,

R. 24.
Using answers

Ord. XXXI.
r. 24.
to interroga-
tories at trial.

or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

R. 25.
Security for
costs of
discovery to
be given.

By r. 25, "In every cause or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the Court or a judge, be secured in the first instance, as provided by Rule 26 of this order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or, if there is no trial, to the Court or a judge, or shall appear to the taxing officer, to have been reasonably asked for."

R. 26.
Mode of giv-
ing security
for costs of
discovery.

By r. 26, "Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into Court to a separate account in the action, to be called 'Security for Costs Account,' to abide further order, the sum of 5*l.*, and, if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court, to a like account, to abide further order, the sum of 5*l.*, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or a judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into Court, and the time for answering or making discovery shall in all cases commence from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made."

R. 27.
Final disposi-
tion of money
standing to

By r. 27, "Unless the Court or a judge shall at or before the trial otherwise order, the amount standing to the

credit of the 'Security for Costs Account' in any cause or matter shall, after the cause or matter has been finally disposed of, be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but, in the event of the Court or judge ordering him to pay the costs of the cause or matter, the amount in Court shall be subject to a lien for the costs ordered to be paid to any other party."

Ord. XXXI.
r. 27.

"Security for
Costs Ac-
count."

Discovery and
inspection.

By r. 27A, "If after a cause or matter has been finally disposed of, by consent or otherwise, no taxation of costs shall be required, the taxing officer, master, or chief clerk (as the case may be) may, either by consent of the parties, or on being satisfied that any party who has lodged any money to the 'Security for Costs Account' in such cause or matter has become entitled to have the same paid out to him, give a certificate to that effect, which certificate shall be acted on and have effect in all respects as if the same had been an order made in the said cause or matter."

R. 27A.

Certificate for
payment out
of money
lodged to
"Security for
Costs
Account."

The defendants in an action by the plaintiff propounding a will having applied for inspection of documents, it appeared that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix, whose will was in dispute, and had in his possession diaries, extracts from diaries, cash ledgers, bankers' cash books, containing entries and memoranda relating to the deceased and her affairs, which documents were the private property of the solicitor.

Inspection
of documents
in hands of
solicitor.

Held, affirming Jeune, J., that an order could not be made on the plaintiff to produce them for inspection.

Also, affirming Jeune, J., that the solicitor could not be compelled, under Order XXXVII. r. 7, to produce these documents for the purpose of discovery, nor be called for examination at this stage of the proceedings under Order XXXVII. r. 5.

Held, reversing Jeune, J., that an affidavit by which a party objected to produce documents because she claimed

Inspection
of documents
in hands of
solicitor.

Letters to
solicitor and
counsel.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 24, ordering
attendance of
witnesses at
any time for
examination
in open Court.

them "to be privileged, as communications between herself and her solicitor," was insufficient to protect them, it being necessary to show that the letters were professional communications of a confidential character (*h*).

In a suit for revocation of probate on the ground of testator having been of unsound mind, and that the will was obtained by undue influence of the defendants, two of whom were executors and the third universal legatee; four anonymous letters having been received after the action began, relating to matters in dispute, two by the plaintiff, one by her solicitor, and the other by her counsel: the Court held that the letters to the plaintiff must be produced, but that the letters to the solicitor and counsel were privileged, for they must be taken to have been sent to them for the purposes of the action by reason of their being the plaintiff's legal advisers in the action (*i*).

By the 24th section of the Court of Probate Act, 1857, "The Court of Probate may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to be examined in any suit or other proceeding in respect of matters or causes testamentary, and may examine or cause to be examined upon oath or affirmation, as the case may require, parties and witnesses by word of mouth, and may, either before or after, or with or without such examination, cause them or any of them to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and the Court may by writ require such attendance, and order to be produced before itself or otherwise any deeds, evidences, or writings in the same form, or as nearly as may be, as that in which a writ of *subpcena ad testificandum* or of *subpcena duces tecum* is now issued by any of her Majesty's Superior Courts of Law at Westminster; and every person disobeying such writ shall be

(*h*) *O'Shea v. Wood*, (1891) P. 286;
60 L. J., P. D. & A. 82; 65 L. T.
30.

(*i*) *Young v. Holloway*, 12 P. D.
167; 56 L. J., P. D. & A. 81; 57
L. T. 515.

considered as in contempt of the Court, and also be liable to forfeit a sum not exceeding one hundred pounds.” Discovery and inspection.

By Rule 73, Contentious Business, applications for an order for the production of papers or writings purporting to be testamentary may be made to the judge by motion or by summons when a suit is pending, and by a motion upon affidavit when no suit is pending. If it can be shown that a testamentary paper is in the possession, power, or control of any person, a subpoena for the production of the same may be obtained by a registrar’s order, founded on an affidavit. Forms of subpoenas applicable to these cases are given, Nos. 21 and 22; and forms of *præcipe*, Nos. 23 and 24 (*k*). Probate Rules, C. B. 73.
Subpœna for production of testamentary paper.

These subpoenas are issued by virtue of sect. 23 of the Court of Probate Act, 1858, which provides, that “it shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpoena requiring any person to produce and bring into the principal or any district registry, or otherwise as in the said subpoena may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person upon being duly served with the said subpoena shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing.” C. P. Act, 1858 (21 & 22 Vict. c. 89), s. 23.

The motion on affidavit, spoken of in Rule 73, for the production of a testamentary paper, or for the examination in open Court, or by interrogatories, of the person under whose control it is supposed to be, is made under sect. 26 of the Court of Probate Act, 1857, which provides that, “The Court of Probate may, on motion or petition, or otherwise in a summary way, whether any suit or other C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 26.

(*k*) See *post*, Appendix.

Discovery and inspection.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 26.

proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise, as the Court may direct, any paper or writing being, or purporting to be, testamentary, which may be shown to be in the possession or under the control of such person, and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending, or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default; and the costs of any such motion, petition, or other proceeding, shall be in the discretion of the Court."

Probate
Rules, C. B.
132.

By Rule 152 (Contentious Business), "The issuing of fresh subpoenas in each term shall be abolished, and it shall not be necessary to serve more than one subpoena upon any witness" (*g*).

Rules 84—86,
P. R. N.-C.

Rules 84 to 86 (P. R., N.-C.) contain minute directions for the conduct of persons compelled to bring a testamentary paper into the registry in obedience to a subpoena (*h*).

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 26, affidavit
as to letters,
&c., of de-
ceased in
custody of
party.

The Court has power under 20 & 21 Vict. c. 77 (C. P. Act, 1857), s. 26, to order a party to the suit to file an affidavit, setting out what letters written to or by the deceased, or by his direction, are in the custody or under the control of such party, even although the letters are not

(*g*) For form of subpoena, see
post, Appendix.

(*h*) See these rules printed *in
extenso*, in Appendix.

distinctly affirmed to have reference to the testamentary intentions of the deceased. Discovery is a purpose auxiliary to the trial of a question of fact (*i*).

The Court of Probate has power to order any document sufficiently described, and shown to be material to the inquiry going on before it, to be brought into the registry; it has also probably a more extensive power to make general orders as to the discovery and inspection of documents (*k*).

The Court will not, under 20 & 21 Vict. c. 77 (C. P. Act, 1857), s. 26, order the attendance for examination in open Court of the attesting witnesses to a will merely because they may have declined to give information as to the circumstances attending the execution of the same; the proper course is to propound the will (*l*).

A party having been brought before the Court under 20 & 21 Vict. c. 77 (C. P. Act, 1857), s. 26, to be examined as to her knowledge of the testamentary papers of the deceased, counsel was permitted to attend on her behalf, to put questions to her, and also to the other persons who had been required to attend on the same inquiry (*m*).

Where a writ of subpoena was issued in a non-contentious matter, directing a solicitor to bring into the probate registry a script which was stated to be, but which was not in effect in his possession or control:—Held, that his non-compliance with the subpoena was not under the circumstances a contempt, that the fact that he had not followed the practice general in such cases (and compulsory in a contentious matter) of filing an affidavit explaining the reason of his non-compliance, with which practice he was acquainted, was not a contempt (*n*).

Where the executors of the solicitor of a deceased

(*i*) *Hunt v. Anderson*, L. R., 1 M. 70; 16 L. T. 299; 15 W. R. P. & D. 476; 37 L. J., P. & M. 778.

27; 18 L. T. 33; 16 W. R. 583. (*m*) *In the goods of Cope*, 36 L. J.,

(*k*) *Peacock v. Lowe*, 36 L. J., P. P. & M. 83.

& M. 91; 16 L. T. 641. (*n*) *Rawlings v. Emmerson*, 57 L.

(*l*) *Evans v. Jones*, 36 L. J., P. & J., P. D. & A. 1.

Discovery and inspection.

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 26.

Court has power to order material document to be brought into registry.

Will not make order where will ought to be propounded.

Party brought into Court under sect. 26 may be represented by counsel.

Disobedience to subpoena—script not in solicitor's possession—contempt of Court.

Solicitors of deceased testatrix refusing information as to wills executed by her.

testatrix had refused to give information as to previous wills alleged to have been executed by the testatrix to persons who believed themselves to have been benefited by them, the Court, under the 26th section of Probate Act, ordered them to bring into registry all wills and testamentary papers of deceased in their possession, and to allow applicants to take copies of them (*o*).

Of administration pendente lite.
—

“In a case of controversy in the Spiritual Courts concerning the right of administration to an intestate, it seems to have been admitted, that it was competent to the ordinary to appoint an administrator *pendente lite*” (*p*).

In Ecclesiastical Courts.

For many years, however, the Ecclesiastical Courts did not consider this power extended to any case where there was a will, though from the year 1731 (*q*) to the passing of the Probate Act of 1857, these appointments were made equally in cases of testacy and intestacy (*r*).

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 70.

Now by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 70, “Pending any suit touching the validity of a will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person, and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court, and act under its direction.”

Ibid., s. 71.

And by sect. 71, “It shall be lawful for the Court of

(*o*) *In the goods of Shepherd*, (1891) P. 323; 60 L. J., P. D. & A. 102.

(*p*) Wms. on Exors., 9th ed. 427.

(*q*) *Walker v. Wollaston*, 2 P. Wms. 589.

(*r*) See, on this subject generally, *ibid.* 427—433. For cases as to administration *pendente lite*, previous to the passing of the Court of

Probate Act, 1857, see *Sutton v. Smith*, 1 Cas. temp. Lee, 207; *Hellier v. Hellier*, 1 Cas. temp. Lee, 281; *Bond v. Bond*, 1 Cas. temp. Lee, 333; *Stratton v. Ford*, 2 Cas. temp. Lee, 49; *Maskeline v. Harrison*, 2 Cas. temp. Lee, 258; *Northey v. Cock*, 1 Add. 329; *Stanley v. Bernes*, 1 Hagg. 222; *Re Graves*, 1 Hagg. 313.

Probate to appoint any administrator appointed as aforesaid or any other person to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of the will of any such deceased person, by which his real estate may be affected; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate as the Court may direct."

Of administration *pendente lite*.

And by sect. 72, "The Court of Probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court think fit."

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 72.

Remuneration to administrators *pendente lite* and receivers.

By sect. 22 of the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), "All the provisions contained in the Court of Probate Act, respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act."

C. P. Act, 1858 (21 & 22 Vict. c. 95), s. 22.

Administration pending suit deemed to apply to appeals.

And by sect. 21, "It shall be lawful for the Court of Probate to require security by bond, in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said Court, under sect. 71 of the Court of Probate Act; and the Court may, on application made on motion, or in a summary way, order one of the registrars of the Court to assign the same to some person to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security, or put the same in force in their or his own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof."

C. P. Act, 1858, s. 21. The Court of Probate may require security from a receiver of real estate.

By Rule 79 (Contentious Business), "A receiver of real estate pending suit is to give bond in the form given, No. 29, or in a form as near thereto as the circumstances of the

Probate Rules, C. B. r. 79.

Receiver of real estate.

Probate
Rules, C. B.

R. 96.
Accounts of
administra-
tors and
receivers
pending suit.

Affidavit on
motion for
appointment
of receiver
must show
heir-at-law
has been
cited.

Security to
extent of one
year's income
of property.

Nominee of
parties
usually
accepted.

In interest
suit.

case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the judge."

And by Rule 96, "Every administrator *pendente lite* and receiver of real estate shall exhibit an inventory and render an account of the property of the deceased which comes to his hands, and the accounts of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report before the same are allowed by the Court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination."

Upon a motion for the appointment of a receiver under C. P. Act, 1857, s. 71, it must appear upon affidavit that the heir-at-law has been cited (s).

In *Charlton v. Hindmarsh* (t), the Court appointed an administrator *pendente lite* on condition that the administrator gave security to the extent of one year's income of the property, his administration to be under the direction of the Court; and further, that he should not discharge claims on the estate until they had passed the registrar.

If the parties to a probate action agree to the appointment of a particular person as administrator or receiver *pendente lite*, their nominee is usually accepted by the Court (u); otherwise the practice is to refer the matter to the registrar to appoint some fit and proper person to take the grant.

In an interest suit, where the defendant had been made receiver in respect of the same estate in proceedings in Chancery, the Court appointed him administrator *pendente lite*, on his affidavit that the estate in certain particulars would be benefited by being dealt with by a person

(s) *Purdey v. Field*, 33 L. J., P. & M. 73; 12 W. R. 1088.

(u) *De Chatelaine v. De Pontigny*, 1 S. & T. 34; 27 L. J., P. & M.

(t) 1 S. & T. 519; 8 W. R. 259. 18.

clothed with such authority, and on consent of the parties to the suit (*x*).

Where a widow, deceased, had been appointed executrix and universal legatee to her husband, and had died without having taken probate, the Court granted administration *pendente lite* (litigation having arisen respecting her will) to her husband's estate as well as her own (*y*).

Where a suit was instituted to try the validity of a second codicil only which did not in any way affect the appointment of executors, the Court refused to appoint an administrator *pendente lite* (*z*).

The plaintiff and deceased, as joint tenants, had for many years leased certain farms, each having provided a portion of the capital required for their management; the plaintiff was the executor named, not only in the will in dispute, but also in a will of earlier date, which was propounded by one of the defendants; the Court refused, on a suggestion that the plaintiff was selling the stock and produce of the farms unduly and unnecessarily, to appoint an administrator *pendente lite* (*a*).

An administrator *pendente lite*, acting under an order of the Court of Chancery, which directed the personal estate of the intestate to be applied in payment of her debts and funeral expenses in a due course of administration, advertised for sale the unrealized portions of the estate, consisting chiefly of personal ornaments and family relics; the estate, exclusive of such articles and things, was insufficient to meet the debts proved and claimed, but plaintiff, in order to prevent the sale, was willing to deposit in the registry a sum sufficient to cover the deficiency:—The Court, though deeming the offer of the plaintiff a reasonable one, declined to restrain the administrator from pro-

Of administration *pendente lite*.

Executrix dying without taking probate. Administration *pendente lite* to estate of original testator.

Suit as to second codicil only. Administrator *pendente lite* refused.

Plaintiff and deceased joint tenants; plaintiff executor in two wills administrator *pendente lite* refused.

Administrator *pendente lite* acting under order of Court of Chancery.

(*x*) *Her Majesty's Procurator-General v. Williams*, 2 S. & T. 22 L. T. 631; 18 W. R. 901.

353; 5 L. T. 765.

(*y*) *In the goods of Dawes*, L. R., P. & D. 103; 35 L. J., P. & M. 55; 12 Jur., N. S. 673; 14 L. T.

(*z*) *Mortimer v. Paull*, L. R., 2 137; 14 W. R. 515.

Of administration *pendente lite*.

Court will appoint in cases where a receiver would be appointed in Chancery Division.

Cannot give permission to pay annuity except with consent of all parties interested.

Appointment of administrator *pendente lite* pending an appeal to House of Lords.

Court must be satisfied parties interested have been cited before receiver appointed.

ceeding with the sale, and intimated that as a rule it would not interfere with an administrator acting under an order of the Court of Chancery (b).

The Court will appoint an administrator *pendente lite* in all cases in which it is the practice of the Court of Chancery to appoint a receiver, and even if a receiver has already been appointed (c).

In appointing an administrator *pendente lite*, the Court cannot, except with the consent of all interested parties, give him special powers to pay an annuity, by way of maintenance, to one of the residuary legatees, who is also one of the next of kin (d).

In a testamentary suit the Court pronounced for the will, and probate was delivered out to the executors, the defendants, pending an appeal to the House of Lords. The executors were unable to make such a title to certain leasehold property, part of the testator's estate, as the purchaser was entitled to require; the Court, under these circumstances and no one opposing, allowed the executors to bring in the probate, and made to them a grant of administration *pendente lite* (e).

Before a receiver of real estate can be appointed the Court must be satisfied, on affidavit, that the parties interested in the realty have been cited (*Purday v. Field*, 3 S. & T. 576); and the actual *validity* of a will affecting real estate must be in dispute. It will not suffice if the dispute be merely as to the appointment of executors, although the will may affect the realty (f).

And where an estate was insolvent the Court refused to grant administration *pendente lite* to a creditor, who had

(b) *Tichborne v. Tichborne*, L. R., 2 P. & D. 41; 39 L. J., P. & M. 23; 22 L. T. 42.

(c) *Bellew v. Bellew*, 4 S. & T. 58; 34 L. J., P. & M. 125; 13 L. T. 247; 11 Jur., N. S. 588; *Tichborne v. Tichborne*, *ubi supra*; and 17 W. R. 832.

(d) *Whittle v. Keats*, 35 L. J., P. & M. 54.

(e) *Wright v. Rogers*, L. R., 2 P. & D. 179; 40 L. J., P. & M. 8; 23 L. T. 569; 19 W. R. 192.

(f) *Grant v. Grant*, L. R., 1 P. & D. 654; 38 L. J., P. & M. 55; 20 L. T. 684.

proved his debt in an administration suit in Chancery, till particulars of the creditor's claim were before the Court, and certain minor children interested in the estate had been cited (*g*).

The duties of an administrator and receiver pending suit commence from the date of the order of appointment, and, if the decree of the action is appealed from, do not cease until the appeal has been disposed of. Costs of the administrator and receiver pending suit and of his solicitor allowed from the date of the appointment until the dismissal of the appeal (*h*).

The "Guarantee Society" may be accepted as surety to a bond given by an administrator pending suit, even though the directors do not by the bond render themselves personally responsible (*i*).

Where an administrator *pendente lite* had been appointed, and had been ordered to give security in a penal sum of 10,488*l.* for the due administration of the estate, the Court, on the application of an intervener, allowed him to pay 50*l.* out of the estate to a guarantee society, which was willing to enter into a bond on his behalf, on condition that the intervener should undertake to reimburse the estate in the event of his failing in the suit and being condemned in costs (*k*).

Where the plaintiff in a probate action, who was also executor, had been appointed receiver of the real estate, and had also obtained a general grant of administration *pendente lite* to the personal estate, but, in consequence of the large amount of property involved, was unable to obtain the requisite sureties to the administration bond, the Court declined to dispense with sureties altogether,

Of administration *pendente lite*, application by creditor for grant of, to insolvent estate.

Duties of administrator *pendente lite* commence from appointment, and continue until appeal disposed of.

Guarantee society as surety to bond.

Administrator *pendente lite* allowed to pay 50*l.* to guarantee society to give security.

Large amount of property, sureties to bond unobtainable.

(*g*) *In the goods of Bradley*, 14 W. R. 409.

(*h*) *Taylor v. Taylor*, 6 P. D. 29; 50 L. J., P. D. & A. 45; 45 J. P. 457.

(*i*) *Carpenter v. Queen's Proctor*,

7 P. D. 235; 51 L. J., P. D. & A. 91; 46 L. T. 821; 31 W. R. 108; 46 J. P. 663.

(*k*) *In the goods of Harver*, 14 P. D. 81; 58 L. J., P. D. & A. 72; 61 L. T. 338; 37 W. R. 768.

General grant reduced to grant limited to specific sums of money.

Deceased wife sole executrix—her will in dispute.

Judicature Act, 1873, s. 25, sub-s. 8. Receiver where no *lis pendens*.

Executor intermeddling before probate; injunction; receiver.

but reduced the general grant to a limited grant, so as to entitle him to receive certain specific sums of money only, and ordered him to give security in double the amount of such specific sums (*l*).

A husband died, leaving a will of which his wife was sole executrix at the time of his death. She took out probate and left a will, which was disputed in a pending action. A representative of the husband being required to receive money due to the estate, the Court appointed an administrator *pendente lite* to the estate of the husband (*m*).

Where the parties to a testamentary suit took no steps to bring it to trial, and an action had been begun in the Chancery Division, in which a receiver had been appointed, the Court, on the application of a creditor not a party to the testamentary suit, appointed an administrator *pendente lite* (*n*).

By the Judicature Act, 1873, s. 25, sub-s. 8, any judge of the High Court may appoint a receiver of the estate of a deceased person before a grant of probate or administration, notwithstanding there is no *lis pendens*. Any such application, being on the way to probate proceedings, should be made in the Probate Division, and if made elsewhere will not be encouraged (*o*).

So where an executor before obtaining probate and without the consent of co-executor, made propositions to sell the assets, the Court granted leave to the co-executor to issue a writ against him claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (*p*).

(*l*) *Askew v. Askew*, (1891) P. 174; 60 L. J., P. D. & A. 52; 64 L. T. 145.

(*m*) *In the goods of Fawcett*, 14 P. D. 152; 58 L. J., P. D. & A. 87; 61 L. T. 303 (*In the goods of Dawes*, L. R., 2 P. & D. 147, doubted but followed).

(*n*) *In the goods of Evans*, 15 P. D. 215; 60 L. J., P. D. & A. 18; 63 L. T. 254.

(*o*) *In re Parker, Dearing, and Brooks*, 54 L. J., Ch. 694.

(*p*) *In the goods of Moore*, 13 P. D. 36; 57 L. J., P. D. & A. 37; 58 L. T. 386; 36 W. R. 576; 52 J. P. 200.

CHAPTER XXVI.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION IN
CONTENTIOUS BUSINESS—*continued.*

TRIAL.

By Order XXXIV. (a) r. 1, "The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial."

Ord. XXXIV.
r. 1.
Special case
by consent.

By r. 2, "If it appear to the Court or a judge, that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

R. 2.
Special case
by order
before trial.

(a) See Annual Practice, 1892, pp. 597—604.

Ord. XXXIV. By r. 3, "Every special case shall be printed by the plaintiff, and signed by the several parties or their counsel or solicitors, and shall be filed by the plaintiff. Three printed copies for the use of the judges shall be left therewith."

R. 4. Leave to set down where married woman, &c., is a party. By r. 4, "No special case in any cause or matter to which a married woman, (not being a party thereto in respect of her separate property or of any separate right of action by or against her,) infant, or person of unsound mind not so found by inquisition is a party, shall be set down for argument without leave of the Court or a judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true."

R. 5. Form of entry for argument. By r. 5, "Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 25 in Appendix G. (a), and also, if any married woman, infant, or person of unsound mind not so found by inquisition be a party to the cause or matter, producing a copy of the order giving leave to enter the same for argument."

R. 6. Agreement as to payment of money and costs. By r. 6, "The parties to a special case may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, that, on the judgment of the Court being given in the affirmative or negative of the questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the cause or matter; and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal."

(a) See form in Appendix.

By r. 7, "This Order shall apply to every special case stated in a cause or matter, or in any proceeding incidental thereto." Ord. XXXIV. r. 7.
Application of order.

By r. 8, "Any special case may hereafter be stated, for the same purposes and in the same manner as was provided by the Act 13 & 14 Vict. c. 35, and the same shall be deemed to be a special case stated in a matter within the meaning of this Order" (b). R. 8.
Special case under Sir G. Turner's Act.

It has been thought better to insert this Order as it stands in the Rules of the Supreme Court. At the same time, as in a probate action the questions of law arising therein are usually raised on the pleadings, it is not easy to conceive any set of circumstances under which these provisions for a special case could be utilized in the Probate Division, though at the same time it is impossible to say that such a case might not arise.

The next step to consider is the method of determining the facts in dispute in a probate action.

By Order XXXVI. r. 4 (c), "The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act could, without any consent of parties, have been tried without a jury." Ord. XXXVI. r. 4.
Causes formerly triable without a jury.

In accordance with the practice of the Probate Court, it is still in the discretion of the judge of the Probate Division to direct questions of fact to be tried with or without a jury, except where the heir-at-law is a party to the action, and insists upon his right to have the issues of fact tried by a jury, under sect. 35 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). Heir-at-law, right to jury in probate action.
Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 35.

Nor will the Court of Appeal interfere with the discretion of the judge in such cases, unless it is clear that his discretion has been wrongly exercised. Court of Appeal will not interfere with discretion of judge as to mode of trial.

(b) For cases on practice under this rule, see Annual Practice, 1892, pp. 597—604.

(c) See Annual Practice, 1892, pp. 619—648.

Ord. XXXVI.
r. 4.

C. P. Act,
1857. (20 & 21
Vict. c. 77),
s. 35.

Case tried
twice over by
jury—order
for trial with-
out jury up-
held by Court
of Appeal.

Where an action had been twice tried by a special jury, and in each case the jury had disagreed and been discharged, and the plaintiff had set the case down again for trial before a special jury, the Court, the heir-at-law appearing and not opposing, ordered that the action should be tried by the Court alone. On appeal it was held that the case was one where, under 20 & 21 Vict. c. 77, s. 35, as the heir-at-law did not ask for a jury, the judge could, before the Judicature Act, without any consent, have ordered the case to be tried without a jury; and therefore, under Order XXXVI. r. 4, the judge had jurisdiction to make the order appealed from (*d*).

R. 7.

Special jury
at desire of
plaintiff.

By r. 7, “(b) The plaintiff, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial:

Special jury
at desire of
defendant.

“(c) The defendant, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given :

Special jury
by order of
judge.

“(d) Provided that a judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just.”

An application for a certificate for a special jury should be made while the matter is fresh in the mind of the judge (*e*).

R. 9.

Trial to be
before single
judge.

By r. 9, “Every trial of any question or issue of fact with a jury shall be by a single judge, unless such trial be specially ordered to be by two or more judges.”

(*d*) *Burgoine v. Moordaff*, 8 P. D.
205; 52 L. J., P. D. & A. 77; 48
L. T. 504; 31 W. R. 735.

(*e*) *Webster v. Appleton*, 6 L. T.
704; see also 6 Geo. 4, c. 50, s. 34.

By r. 11, "Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial."

Ord. XXXVI.

r. 11.

Notice of trial
by plaintiff.

By r. 12, "If the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or judge may seem just."

R. 12.

Notice of trial
by defendant:
motion to
dismiss for
want of
prosecution.

By r. 14, "Ten days' notice of trial shall be given, unless the party to whom it is given has consented, or is under terms or has been ordered to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a judge. Short notice of trial shall be four days' notice, unless otherwise ordered."

R. 14.

Ten days'
notice of trial.

By r. 15, "Notice of trial shall be given before entering the trial: and the trial may be entered notwithstanding that the pleadings are not closed, provided that notice of trial has been given."

R. 15.

Entry of trial.

By r. 16, "In London and Middlesex, unless within six days after notice of trial is given, the trial shall be entered by one party or the other, the notice of trial shall be no longer in force."

R. 16.

Avoidance of
notice of trial.

By r. 17, "Notice of trial for London or Middlesex shall not be or operate as for any particular sittings; but shall be deemed to be for any day after the expiration of the notice on which the trial may come on in its order upon the list."

R. 17.

Notice of trial
in London or
Middlesex.

By r. 18, "Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the

R. 18.

Notice of
trial in the
country.

Ord. XXXVI. then next assizes at the place for which notice of trial is given."

R. 19. By r. 19, "No notice of trial shall be countermanded except by consent, or by leave of the Court or a judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just."

R. 20. By r. 20, "If the party giving notice of trial for London or Middlesex omits to enter the trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last preceding rule, within four days enter the trial."

R. 22B. By r. 22B, "After notice of trial has been given of any cause, matter, or issue to be tried elsewhere than in London or Middlesex, either party may, at any time not less than seven days before the commission day appointed for such place, enter the trial at the next assizes in the district registry (if any) (*f*) of the city or town where the trial is to be had, or with the associate. No later entry shall be allowed, except by leave of a judge going that circuit, or by order of a judge at chambers subject to the consent of a judge going that circuit."

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 35. By the Court of Probate Act, 1857, s. 35, it was enacted that "It shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding under this Act to be tried by a special or common jury by means of an issue to be directed to any of the superior courts of common law, in the same manner as an issue may now be directed by the Court of Chancery."

The registrar, in a suit for revocation of probate, has no power to order the venue to be changed, and

(*f*) This, of course, means the "Registry" of the Probate Division. district registry created by the Judicature Acts; *not* the "District

to direct the suit to be removed from London to the assizes (*f*). Trial at assizes.

The power of a judge of the Probate Division to order a probate action to be tried at assizes is discretionary, and is only exercised for good cause shown. Power of judge to order.

It is said that the Probate Court in London is the proper place for the trial of a probate action, and that the only ground which induces the Court to direct an issue to the assizes is the saving of expense in respect of the witnesses, and when one of the parties applies for an issue, and the other party opposes the application, and offers to undertake to pay the extra costs occasioned by bringing the witnesses to London, the judge invariably directs the cause to be tried in the Probate Court.

No doubt these principles have usually been acted upon, but they cannot be accepted as forming a binding rule of practice, as they may be modified at any time. Principles guiding Court in making order.

By Order XXXVI. r. 1 (*g*), there shall be no local venue for the trial of any action, except where otherwise provided by statute. Every action in every division shall, unless the Court or a judge otherwise orders, be tried in the county or place named on the statement of claim, and, except under special circumstances, the Court will not allow causes to be tried out of Middlesex, unless the application is made in the statement of claim in pursuance of this order (*h*). Ord. XXXVI. r. 1.
Venue to be named in statement of claim.

In a testamentary suit touching the validity of a will the jury was discharged without agreeing to a verdict.

A rule absolute for a new trial was granted, but on motion by the plaintiff, at whose instance the first trial was had, the Court refused to change the venue to Stafford Assizes (*i*). New trial.
Order to remove to assizes refused.

(*f*) *Lancaster v. Brook*, 14 P. D. 80; 58 L. J., P. D. & A. 67; 60 L. T. 680; 37 W. R. 768; 53 J. P. 343.

(*g*) See Annual Practice, 1892, p. 493.

(*h*) *Ridge v. Ridge*, 35 L. T. 428.

(*i*) *Mumford v. Shuffelebotham*, 21 L. T. 835.

Trial at
assizes.

Consent of
parties not
alone suffi-
cient.

Judge's
power dis-
cretionary.

Suit for revo-
cation of
probate.

Leave to try
at assizes
refused.

Ibid.

Lost will.

No power to
order trial at
assizes with-
out jury.

The consent of all parties that an issue in a testamentary matter should go down to the assizes is not sufficient: there must be an affidavit assigning reasons to the satisfaction of the Court (*j*).

A testamentary suit is at large, and ought to be tried before the judge in the Court of Probate, though he has a discretionary power to send an issue to be tried before a judge of assize (*k*).

In order to save expense and delay, the Court will generally allow issues in a testamentary suit, to be tried at the assizes. When, however, the suit was for revocation of probate, and there had been great delay in calling in the probate, and the property of the deceased was large, the Court considered those circumstances sufficient grounds for refusing an application by the plaintiff, opposed by the defendant, that the issues should be tried at the assizes, but ordered that the defendant, if successful, should not be allowed more costs than he would have been entitled to if the issues had been tried at the assizes (*l*).

Where the principal issue raised in a testamentary suit was whether the deceased had destroyed, with the intention of revoking it, a will which was not forthcoming; the Court refused to send the issues for trial at the assizes (*m*).

The Court of Probate has no power to order an issue to be tried at the assizes, by a judge without a jury. If both parties wish the issue to be so tried, they should apply to the judge, who will try the issue under sect. 1 of the Common Law Procedure Act, 1854 (*n*).

When a County Court has jurisdiction, the Court may, though application is made on behalf of all the parties to

(*j*) *Bull v. Bull*, 30 L. J., P. & M. 40.

(*k*) *Cooper v. Moss*, 1 S. & T. 143. It is scarcely possible to say positively whether this is or is not so since the passing of the Judicature Acts.

(*l*) *Ridgway v. Abington*, 32 L. J., P. & M. 107; 11 W. R. 500.

(*m*) *Beech v. Rathbone*, 35 L. J., P. & M. 26.

(*n*) *Bushell v. Blenkhorn*, L. R., 1 P. & D. 89; 35 L. J., P. & M. 75; 13 L. T. 804; 14 W. R. 408.

the cause for it to be tried at the assizes, still in its discretion direct it to be tried in the County Court (o).

Trial at assizes.

By Order XXXVI. r. 30, "The party entering the trial shall deliver to the proper officer two copies of the whole of the pleadings, one of which shall be for the use of the judge at the trial. Such copies shall be in print, except as to such parts (if any), of the documents as are by these rules permitted to be written" (p).

Ord. XXXVI. r. 30.
Papers for judge.
Copies of pleadings to be delivered.

By r. 54, Contentious Business, "The party who has deposited the record shall set down the cause for trial or hearing, and upon the day on which he so sets it down shall give notice of his having done so to each party for whom an appearance has been entered; but if he delay setting down the cause for trial or hearing for the space of one month after the Court has directed the mode in which the questions at issue shall be tried or heard, either of the other parties may set the cause down for trial or hearing, and give a similar notice. A copy of every such notice shall be filed in the registry; and the cause, unless the judge shall otherwise direct, shall come on in its turn" (q).

Probate Rules, C. B. 54.

And by r. 55, Contentious Business, "No cause is to be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the written consent of all parties to the suit, previously filed in the registry."

Rule 55, C. B.

These two rules must be read with the above Rules 11, 12, 14, and 30 of Order XXXVI. There is now no record to be deposited, but two copies of the pleadings (r) are deposited in the principal registry in its place. Notice of trial must be given to all parties who have entered an appearance, including *parties cited* and *interveners*, and the

Must be read with Ord. XXXVI. rr. 11, 12, 14, and 30.

(o) *Dunn v. Dunn*, 1 S. & T. 521; 30 L. J., P. & M. 40; 8 W. R. 259.

ducing to the proper officer a consent in writing, signed by the parties."

(p) Order XXVI. r. 2, "When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon pro-

(q) It is a question whether this rule is now in force.—[D.]

(r) Also a *præcipe*.—[D.]

action will not come on for trial until after the expiration of ten days from the time it has been entered.

Ord. XXXVI.
r. 31.

Proceedings
at trial.

Default of
appearance by
defendant at
trial.

R. 32.

Default of
appearance by
plaintiff.

By Order XXXVI. r. 31 (x), "If, when a trial is called on, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him."

By r. 32, "If, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action, but if he has a counterclaim, then he may prove such counterclaim so far as the burden of proof lies upon him."

R. 33.

Judgment by
default may
be set aside
on terms.

By r. 33, "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex."

R. 34.

Adjournment
of trial.

By r. 34, "The judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit."

R. 35.

Habeas corpus
to bring up
party to
attend trial.

By r. 35, "Where a party is brought up to attend the trial or hearing of a cause or matter by virtue of any writ of *habeas corpus* duly issued from the Central Office, and by reason of the pressure of other business, or from any other cause, the trial or hearing of the cause or matter in which such party is concerned is postponed to a future day, a new writ of *habeas corpus* may be issued for such future day, if the Court or a judge shall so direct, without payment of any fee."

R. 36.

Speeches to
jury.

By r. 36, "Upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or

his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore.” Ord. XXXVI. r. 36.

By r. 38, “The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter.” R. 38. Disallowance of vexatious questions in cross-examination.

By r. 39, “The judge may, at or after a trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or judge.” R. 39. Judgment—further consideration.

By r. 40, “The registrar, master, or other proper officer present at any hearing or trial, shall make a note of the times at which such hearing or trial shall commence and terminate respectively, on each day on which the same shall take place, for communication to the taxing officer if required.” R. 40. Times of commencement and termination of trial.

By r. 41, “Upon every trial at the assizes . . . where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate or master shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment, and the certificates, if any, granted by the judge, in a book to be kept for the purpose.” R. 41. Entry of findings of fact on trial at assizes, &c.

By r. 42, “If the judge shall direct that any judgment be entered for any party absolutely, the certificate of the associate or master to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate shall be in the Form No. 17 in Appendix B. (y), with such variations as circumstances may require.” R. 42. Certificate for entry of judgment.

(y) See form in Appendix. As to the power of the judge to amend pleadings in the course of a trial, see *Riding v. Hawkins*, 14 P. D. 56; 58 L. J., P. D. & A. 48; 60 L. T. 869; 37 W. R. 575.

Ord. XXXIX.
r. 1.

Motion for
new trial.

Court to
which motion
for new trial,
&c., shall be
made.

By Order XXXIX. r. 1 (*q*), "Every motion for a new trial or to set aside a verdict, finding, or judgment, shall be made (1) in every cause or matter by the principal Act assigned to the Probate, Divorce, and Admiralty Division, where there has been a trial thereof or of any issue therein with a jury, to a Divisional Court of that Division, one of the judges of which shall (when practicable) sit on the hearing of such motion; (2) in every other cause or matter, where there has been a trial thereof or of any issue therein with a jury, to a Divisional Court of the Queen's Bench Division; and (3) where there has been a trial without a jury, by appeal to the Court of Appeal."

Jud. Act,
1890, s. 1.
Motions for
new trial.

Now by the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, it is enacted that "from and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury shall be heard and determined by the Court of Appeal and not by a Divisional Court of the High Court: Provided always, that such motions shall be heard and determined before not less than three judges of the Court of Appeal sitting together.

"This section shall extend to every such motion of which notice may have been given, whether before or after the passing of this Act, but which has not been heard before the commencement of this Act."

Ibid. s. 2.
Motions for
judgment.

And by sect. 2, "Every motion for judgment in any such cause or matter shall be heard and determined by the judge before whom such trial with a jury took place, and not by a Divisional Court, unless it be impossible or inconvenient that such judge should act, in which case such motion shall be heard and determined by some other judge to be nominated by the President of the Division to which the cause or matter belongs."

Ibid. s. 3.
Power to
make rules.

By sect. 3, "The power of making rules conferred by

the Supreme Court of Judicature Act, 1873, and the Acts amending the same shall extend to this Act.” Jud. Act,
1890, s. 3.

The following rule has been issued under sect. 3 of the above Act:—

“Every motion for a new trial, or to set aside a verdict, finding, or judgment, where there has been a trial thereof, or of any issue therein with a jury, shall be entered in the Court of Appeal, in the same way as motions by way of appeal to the Court of Appeal are now entered where there has been a trial without a jury. Such first-mentioned motions shall be subject to the provisions of Ord. XXXIX. r. 4, and shall be brought before the Court of Appeal in like manner as an appeal.” New rule
under.

By r. 2, “No judge shall sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself.” Ord. XXXIX.
r. 2.
Same judge
not to sit on
motion for
new trial.

This and the three following rules are new (1883).

By r. 3, “Every application for a new trial shall be by notice of motion, and no rule *nisi*, order to show cause, or formal proceeding other than such notice of motion, shall be made or taken. The notice shall state the grounds of the application, and whether all or part only of the verdict or findings is complained of.” R. 3.
Mode of
application
for new trial.

This rule applies to the Probate Division as well as to the Queen’s Bench (r).

By r. 4, “The notice of motion shall be an eight days’ notice, and shall be served within the times following: viz., if the trial has taken place in London or Middlesex, within eight days after the trial; if the trial has taken place elsewhere than in London or Middlesex, within seven days after the last day of sitting on the circuits for England and Wales during which the trial shall have taken place. The time of the vacations shall not be reckoned in the computation of the time for serving the notice of motion.” R. 4.
Time for
service of
notice of
motion.

(r) *Murfett v. Smith*, 12 P. D. L. T. 498; 35 W. R. 460; 51 J. P. 116; 56 L. J., P. D. & A. 87; 57 374.

Ord. XXXIX. By r. 5, "The notice may be amended at any time by
r. 5. leave of the Court or a judge on such terms as the Court
Amendment of notice of motion. or judge may think just."

R. 6. By r. 6, "A new trial shall not be granted on the ground
Ground for granting new trial. of misdirection or of the improper admission or rejection
of evidence, or because the verdict of the jury was not
taken upon a question which the judge at the trial was not
asked to leave to them, unless in the opinion of the Court
to which the application is made some substantial wrong
or miscarriage has been thereby occasioned in the trial;
and if it appear to such Court that such wrong or mis-
carriage affects part only of the matter in controversy, or
some or one only of the parties, the Court may give final
judgment as to part thereof, or some or one only of the
parties, and direct a new trial as to the other part only or
as to the other party or parties."

R. 7. By r. 7, "A new trial may be ordered on any question
New trial ordered on any one question. whatever be the grounds for the new trial, without
interfering with the finding or decision upon any other
question."

R. 8. By r. 8, "A new trial shall not be granted by reason of
Wrong rulings as to sufficiency of stamp. the ruling of any judge that the stamp upon any docu-
ment is sufficient, or that the document does not require a
stamp."

Plaintiff convicted of perjury, new trial refused notwithstanding. In a testamentary suit, the jury, being unable to agree,
was discharged without giving a verdict. The question in
dispute, the capacity of the deceased, was afterwards re-
ferred to a second jury, who found in the affirmative and
for the plaintiff. Application was made for a new trial
on the ground of the verdict being against the weight of
evidence, but it was refused. Subsequently the plaintiff
was convicted of perjury in reference to the evidence he
gave in the suit:—Held, that the circumstance was not in
itself sufficient to justify the Court in allowing a new trial
after an application with that object had been rejected (s).

(s) *Davies v. Brecknell*, L. R., 3 P. & D. 88; 42 L. J., P. & M. 39; 28 L. T. 604.

When the Court of Probate granted a rule nisi for a new trial, and made it absolute to enter a verdict, the House of Lords, upon an appeal from the order in this form, entertained the original question of new trial, and made the order which ought to have been made in the Court below (*t*).

New trial.
Jurisdiction
of House of
Lords.

Leave to appeal from an order discharging a rule for a new trial was refused on the ground that it was unnecessary, the final decree being under appeal (*u*).

By Order XL. (*v*), r. 1, "Except where by the Acts or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment."

Ord. XL. r. 1.
Motion for
judgment.

Judgment on
motion for
judgment.

R. 2.
Where no
judgment
entered at
trial.

By r. 2, "Where at the trial the judge . . . abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment. If he does not set down such a motion and give notice thereof to the other parties within ten days after the trial, any defendant may set down a motion for judgment, and give notice thereof to the other parties."

By r. 3, "Where, at or after a trial with a jury, the judge has directed that any judgment be entered, any party may apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason that the finding of the jury upon the questions submitted to them has not been properly entered."

R. 3.
Where judg-
ment is wrong
on the finding
of a jury.

By r. 4, "Where, at or after a trial by a judge, either with or without a jury, the judge has directed that any judgment be entered, any party may apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong."

R. 4.
Setting aside
judgment
directed to be
entered by
judge.

(*t*) *Fulton v. Andrew*, L. R., 7 H. L. 448; 44 L. J., P. & M. 17; 32 L. T. 209; 23 W. R. 566.

(*u*) *Smith v. Atkins*, L. R., 2 P. & D. 169; 39 L. J., P. & M. 78; 22 L. T. 247.

(*v*) See *Annual Practice*, 1892, pp. 695—700.

Ord. XL. r. 5.
Applications
to Court of
Appeal.

By r. 5, "An application under Rules 3 and 4 of this Order shall be to the Court of Appeal, unless, where there has been a trial with a jury, there is also a motion for a new trial, in which case it shall be to the Divisional Court by which such motion shall be heard."

Jud. Act,
1890, s. 2.

Now, by sect. 2 of the Judicature Act, 1890 (53 & 54 Vict. c. 44, *as to which see ante*, p. 450), all such motions must be made to the judge before whom the trial was had in every case that has been heard with a jury, or to some other judge to be nominated by the President of the Division.

Ord. XL. r. 7.
Setting down
motion for
judgment
where issues
have been
directed and
tried.

By r. 7, "Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down a motion for judgment as soon as such issues or questions have been determined. If he does not set down such a motion, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down a motion for judgment, and give notice thereof to the other parties."

R. 8.
Where some
only of issues
directed have
been tried,
any party
may apply to
set down
action on
motion for
judgment.

By r. 8, "Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a judge for leave to set down a motion for judgment, without waiting for such trial or determination. And the Court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other issues of fact."

R. 9.
Motion to be
set down
within one
year.

By r. 9, "No motion for judgment shall, except by leave of the Court or a judge, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do."

By r. 10, "Upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit."

Ord. XL.
r. 10.
Where judgment given,
&c., on motion for new trial,
&c.

By Order XLI. (x) r. 1, "Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the cause, other than any petition or summons; such copy shall be in print, except such parts (if any) thereof as are by these rules permitted to be written: Provided that no copy need be delivered of any document a copy of which has been delivered on entering any previous judgment in such cause. The forms in Appendix F. (y) shall be used, with such variations as circumstances may require."

Ord. XLI.
r. 1.
Entry of judgment.
Mode of entry.

By r. 3, "Where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or judge shall otherwise order, and the judgment shall take effect from that date: provided that by special leave of the Court or a judge a judgment may be ante-dated or post-dated."

R. 3.
Date of judgment pronounced in Court.

By r. 4, "In all cases not within the last-preceding rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for

R. 4.
Date of entry otherwise.

(x) See Annual Practice, 1892, pp. 700—704. (y) See form in Appendix.

Ord. XLI. the purpose of such entry, and the judgment shall take
r. 4. effect from that date."

R. 5. By r. 5, "Every judgment or order made in any cause or
Time to be matter requiring any person to do an act thereby ordered
stated for shall state the time, or the time after service of the judgment
doing any act or order, within which the act is to be done, and upon the
ordered to be done. copy of the judgment or order which shall be served upon
Memorandum the person required to obey the same there shall be in-
to be indorsed. dorsed a memorandum in the words or to the effect
following, viz.:—

"If you, the within-named A. B., neglect to obey
this judgment [*or* order] by the time therein limited,
you will be liable to process of execution for the pur-
pose of compelling you to obey the same judgment [*or*
order]."

R. 6. By r. 6, "Where under the Acts or these rules, or other-
Entry on wise, it is provided that any judgment may be entered
production of upon the filing of any affidavit or production of any docu-
affidavit or ment, the officer shall examine the affidavit or document
document. produced, and if the same be regular and contain all
that is by law required, he shall enter judgment accord-
ingly."

R. 7. By r. 7, "Where by the Acts or these rules, or otherwise,
Entry on any judgment may be entered pursuant to any order or
production of certificate, or return to any writ, the production of such
order or certificate sealed with the seal of the Court, or of
certificate. such return, shall be a sufficient authority to the officer
to enter judgment accordingly."

R. 9. By r. 9, "In any cause or matter where the defendant has
Judgment by appeared by solicitor, no order for entering judgment shall
consent where be made by consent unless the consent of the defendant is
defendant given by his solicitor or agent."

R. 10. By r. 10, "Where the defendant has not appeared, or has
Where con- appeared in person, no such order shall be made unless
sent of de- the defendant attends before a judge and gives his consent
fendant in in person, or unless his written consent is attested by a
person.

solicitor acting on his behalf, except in cases where the defendant is a barrister, conveyancer, special pleader, or solicitor.”

Ord. XLI.
r. 10.

At the trial of the action the party on whom the burden of proof is thrown has the right to begin. Therefore, wherever a party propounds a last will, and the validity of such will is disputed, the party propounding has the right to begin (*z*); but where the party opposing the will admits the due execution, but alleges that the will was obtained by undue influence, fraud, or the like, or that the will was revoked, then the burden of proof is thrown upon him, and he has the right to begin (*a*).

Right to
begin.

The Court has jurisdiction to make terms of compromise in a probate action a rule of Court, and to enforce it as such (*b*).

Compromise.

Where an action has been compromised before trial, the Court will, if it thinks fit, order the contentious proceedings to be discontinued and the terms of compromise to be filed in the registry, and, on application by the parties, order them to be made a rule of Court (*c*).

Compromise
before trial.

The Court of Probate will not recognize an agreement for an executor to renounce. Therefore, where at the trial at the assizes of issues in a testamentary suit the suit was compromised on certain terms, *inter alia*, that two of the executors named in the will should renounce, and that the agreement should be made a rule of Court, and these terms were embodied in an order of Nisi Prius, the Court refused to make the order a rule of Court (*d*).

Agreement by
executor to
renounce not
recognized
by Court.

During the progress of a suit a compromise was entered

Compromise
at trial.

(*z*) See *Barry v. Butlin*, 1 Curt. 638; *Cross v. Cross*, 3 S. & T. 292; 33 L. J., P. & M. 49; 12 W. R. 694.

(*a*) See *Hutley v. Grimstone*, 5 P. D. 24; 48 L. J., P. & M. 68; 41 L. T. 53; *Tate v. Tate*, 63 L. T. 112.

(*b*) *Harvey v. Allen*, 1 S. & T. 151.

(*c*) *Roadnight v. Carter*, 3 S. & T. 421. See also *Saunders v. Evans*, 30 L. J., P. & M. 184.

(*d*) *Hargreaves v. Wood*, 2 S. & T. 602; 32 L. J., P. & M. 8.

Compromise. into between the parties and committed to writing. The
Application to make rule of Court two years afterwards refused. verdict was thereupon given for the validity of the will, but no order was made as to costs. The Court two years afterwards refused to permit the terms of compromise to be embodied in an order to be enforced as a rule of Court (e).

Next of kin bound by decree, though not cited; A next of kin, although not cited to see proceedings and not having intervened, is bound by a decree in a suit, in which a will is contested by other next of kin, if he was cognizant of the suit and had an opportunity of intervening.

but not where suit has been compromised. This rule does not apply to a case when the parties to a suit compromise it, and the decree is founded on the compromise.

The Court having pronounced for a will in consequence of a compromise between the parties contesting it, the next of kin, who was no party to the suit, although cognizant of it, was held not to be barred by the decree from instituting a fresh suit for the revocation of probate (f).

Norman v. Strains.
Observations of Lord Hannen.

In the course of his judgment in the case of *Norman v. Strains* (g), Lord Hannen made the following observations as to the compromise of probate actions: "I am extremely unwilling, without knowing the circumstances, to bind infants to the consequences of a compromise which is entered into by the parties to a probate cause before me. I have really no means of forming any judgment upon the wisdom or prudence of the compromise. My duty is to determine whether or no a particular will is the will of the deceased person; but to enable me to say whether there were good grounds upon which counsel came to the conclusion that it would be prudent to make a compromise,

(e) *Garritt v. Christian*, L. R., 2 1015.
P. & D. 181; 24 L. T. 236.

(f) *Wytcherley v. Andrews*, L. R., 2 P. & D. 327; 40 L. J., P. & M. 57; 25 L. T. 134; 19 W. R.
(g) 6 P. D. 219; 50 L. J., P. D. & A. 39; 45 L. T. 191; 29 W. R. 744.

it would be necessary that I should be informed of the facts of the case. I am always willing to give my assistance to counsel when I am consulted as to whether or no a particular arrangement should be carried out, but I always do so with this reservation that upon their statement, as far as I can judge, it seems to be expedient; and I do not thereby intend to bind infants or any persons other than those who are parties to the compromise.”

*Norman v.
Strains.*
Observations
of Lord
Hannen.

CHAPTER XXVII.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION
IN CONTENTIOUS BUSINESS—*continued.*

EVIDENCE.

O. XXXVII.
r. 1.Evidence
generally.Witnesses to
be examined
vivâ voce,
unless other-
wise agreed
or ordered.

By Order XXXVII. (a) r. 1, "In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *vivâ voce* and in open Court, but the Court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the Court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

Attesting
witness not
forthcoming,
affidavit eight
years old
allowed to be
used.

In a suit for revocation of probate on the grounds of undue execution and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success, the Court allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution and capacity (b).

(a) See Annual Practice, 1892, 142; 56 L. J., P. D. & A. 86; 57 pp. 649—673. L. T. 601; 35 W. R. 672; 51 J. P.

(b) *Gornall v. Mason*, 12 P. D. 663.

And, in another case, the Court allowed an affidavit used in a motion formerly made in a suit, and sworn by a witness who had been subpoenaed, but was unable to attend owing to his being at the time of the hearing engaged as a witness elsewhere, to be put in evidence; and treated the application as made before the trial and the above order (b).

Witnesses
unable to
attend, &c.

In an action brought for the purpose of proving a will in solemn form, where none of the parties cited had appeared, the Court declined to order the execution and attestation of the will to be proved by affidavit under Order XXXVII. r. 1 (c).

Evidence by
affidavits.
Order
XXXVII.
r. 1.

The Court will allow affidavits in reply to be read at the hearing of a cause, if it thinks such affidavits are necessary (d).

By r. 3, "An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

R. 3.
Reading
evidence taken
in other causes
or matters.

By r. 4, "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible."

R. 4.
Office copies
admissible in
evidence.

By r. 5, "The Court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or judge, or any officer of the Court, or any other person, and at any place, of any witness or

R. 5.
Examination
of witnesses.
Court or judge
may order
depositions to
be taken.

(b) *Drewitt v. Drewitt*, 58 L. T. 684; 52 J. P. 232. (d) *Cordeux v. Trasler*, 4 S. & T. 48; 34 L. J., P. & M. 127; 11

(c) *Cook v. Tomlinson*, 24 W. R. 551. Jur., N. S. 587.

Order
XXXVII.

person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct."

Commission
as to know-
ledge of
testamentary
paper.

The Court has power to order a commission to issue to examine a person as to his knowledge of a testamentary paper (*e*).

R. 6.

Forms of order
for a commis-
sion, and of
writ of com-
mission.

By r. 6, "An order for a commission to examine witnesses shall be in the Form No. 36 in Appendix K., and the writ of commission shall be in the Form No. 13 in Appendix J., with such variations as circumstances may require" (*f*).

R. 6a.

Request to
examine
witnesses.

By r. 6A, "If in any case the Court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. The Forms 1 and 2 in the Appendix hereto shall be used for such order and request respectively, with such variation as circumstances may require, and may be cited as Forms 37A and 37B in Appendix K." (*g*).

Letters of
request to
foreign Court.

An order for letters of request to issue to a foreign Court under this rule can only be made where it is sought to examine under the order. There is no jurisdiction to make such order when the production of documents only is asked for (*h*).

An examination of witnesses abroad before a special examiner under Rule 5 is not an ordinary commission, so as to prevent the issuing of letters of request in addition thereto under Rule 6A (*i*).

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 32.

The power to issue commissions or give orders for the examination of witnesses who are unable to attend was conferred upon the Court of Probate by the 32nd section

(*e*) *Banfield v. Pickard*, 6 P. D. 33; 50 L. J., P. D. & A. 72; 29 W. R. 613; 45 J. P. 508. See 20 & 21 Vict. c. 77, s. 26.

(*f*) See forms in Appendix.

(*g*) *Ibid*.

(*h*) *Cape Copper Co. v. Comptoir D'Escompte*, 38 W. R. 763.

(*i*) *Mason v. Comptoir D'Escompte*, *Ibid*. 685.

The following are some of the cases on the subject of the practice as to examination of witnesses *de bene esse*, decided in the last ten years in the other divisions of the High Court, but they all apply,

of the Court of Probate Act, 1857, and the powers of the Probate Division in this respect are now the same as those of the rest of the High Court.

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 32.

By the Probate Rules, Contentious Business, r. 116, "Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the judge, or to one of the registrars in his absence, by summons, or if on behalf of a plaintiff proceeding in default of appearance of the parties cited or warned in the cause without summons before one of the registrars, who will direct the order to issue, or refer the application to the judge, as he may think fit."

Probate
Rules, C. B.,
R. 116.

By r. 117, "Such witness shall be examined *vivâ voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the judge or by the registrar to whom the application for the order is made."

C. B., r. 117.

mutatis mutandis, to the Probate Division:—

- (1) Commissions to foreign country: *Berdan v. Greenwood*, 20 Ch. D. 764; 46 L. T. 524; *In re Boyse*, 20 Ch. D. 760; 51 L. J., Ch. D. 660; 46 L. T. 522; 30 W. R. 812; *Langen v. Tate*, 24 Ch. D. 522; 32 W. R. 189; *Nadin v. Bassett*, 25 Ch. D. 21; 49 L. T. 454; 32 W. R. 70; *Wilson v. De Coulon*, 22 Ch. D. 841; 48 L. T. 514; 31 W. R. 839; *Lawson v. Vacuum Brake Co.*, 27 Ch. Div. 137; 54 L. J., Ch. D. 16; 51 L. T. 275; 33 W. R. 186; *Armour v. Walker*, 25 Ch. D. 673; 53 L. J., Ch. D. 413; 50 L. T. 292; 32 W. R. 214; *Cock v. Allcock*, 21 Q. B. D. 178; 57 L. J.,

Q. B. D. 489; 36 W. R. 747.

- (2) Irregularity in taking deposition: *Richards v. Hough*, 51 L. J., Q. B. D. 361; 30 W. R. 676; *Wilson v. Wilson*, 9 P. D. 8; 49 L. T. 430.
- (3) Generally: *Warner v. Mosses*, 16 Ch. D. 100; 50 L. J., Ch. D. 28; 29 W. R. 201; *Bidder v. Bridges*, 26 Ch. D. 1; 50 L. T. 287; 32 W. R. 445; *Solicitor to the Treasury v. White*, 55 L. J., P. D. & A. 79; *In re Stoer, Marquis of Bute v. James*, 33 Ch. D. 157; 55 L. J., Ch. D. 658; 55 L. T. 133; 34 W. R. 754; *Barton v. North Staffordshire Ry.*, 56 L. T. 601; 35 W. R. 536.

See also Annual Practice, 1892, pp. 653—658.

Probate
Rules.

C. B., r. 118.

By r. 118, "The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the judge or the registrar to whom the application is made for the order shall direct a shorter notice to be given."

C. B., r. 119.

By r. 119, "Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a plaintiff proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the judge as he may think fit."

C. B., r. 120.

By r. 120, "A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by one of the registrars, or for want of agreement to be nominated by the registrar to whom the application is made."

C. B., r. 121.

By r. 121, "The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the judge."

C. B., r. 122.

By r. 122, "Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the judge."

By r. 123, "After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars."

Probate Rules.
C. B., r. 123.

When a motion is made for an order for a commission to examine witnesses abroad, the affidavit on which the motion is founded should set out the names of the witnesses whom it is proposed to examine (*k*).

Motion for commission; affidavit must set out names of witnesses.

Where the executors, who propounded a will, applied for a commission for the examination *de bene esse* of an attesting witness, who was resident in London; the affidavit alleged no physical infirmity, but described him as an "elderly person." The Court ordered the commission to issue, but intimated that if it were proposed at the trial to read the evidence taken under it, strict proof of inability to produce the witness would be required (*l*).

Elderly persons.

In a testamentary suit pending in the Court an order was made on the application of the executors, the plaintiffs, for the examination *de bene esse* of the surviving attesting witness to the will, upon affidavit which stated that he was sixty-five years of age, and that the plaintiffs could not safely proceed to trial without his evidence, but were silent as to his then state of health (*m*).

Sixty-five years of age.

In order to found an application for the immediate examination in a pending suit, the affidavit must set out special circumstances. It is not sufficient that it states that the witness is a material witness (*n*).

Special circumstances.

By Order XXXVII. (*o*), r. 7, "The Court or a judge may in any cause or matter at any stage of the proceedings

Order XXXVII.
r. 7.

(*k*) *Ryves v. Att.-Gen.*, L. R., 1 P. & D. 23; 35 L. J., P. & M. 6. P. & D. 720; 38 L. J., P. & M. 78; 21 L. T. 339; 17 W. R. 720.

(*l*) *McPherson v. Parnell*, 40 L. J., P. & M. 30; 24 L. T. 742; 19 W. R. 784. (*n*) *Andrew v. Brooke*, L. R., 3 P. & D. 181; 43 L. J., P. & M. 39; 31 L. T. 102; 22 W. R. 712.

(*m*) *Brown v. Brown*, L. R., 1 (*o*) Annual Practice, pp. 649-673.

Order
XXXVII.
r. 7.

Order for
attendance of
person to
produce
documents.

order the attendance of any person for the purpose of producing any writings or other documents named in the order which the Court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial."

R. 8.
Disobedience
to order for
attendance.

By r. 8, "Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of Court, and may be dealt with accordingly."

R. 9.
Expenses of
person ordered
to attend.

By r. 9, "Any person required to attend for the purpose of being examined or of producing any document shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in Court."

R. 10.
Examiner to
have copy of
writ and
pleadings.

By r. 10, "Where any witness or person is ordered to be examined before any officer of the Court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties."

R. 11.
Persons to be
present at
examination.

By r. 11, "The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination."

R. 12.
Depositions
to be taken
down in
writing, read
over to and
signed by
witness, or if
he refuses, by
the examiner.

By r. 12, "The depositions taken before an officer of the Court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of

the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question."

Order
XXXVII.
r. 12.

Questions
objected to.

By r. 13, "If any person duly summoned by *subpœna* to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court or a judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be."

R. 13.
Refusal of
witness to
attend or to
be sworn.

But a witness is not bound to attend before an examiner without a *subpœna* (o).

By r. 14, "If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court or a judge."

R. 14.
Objection by
witness to
questions.

By r. 15, "In any case under the two last preceding rules, the Court or a judge shall have power to order the witness to pay any costs occasioned by his refusal or objection."

R. 15.
Costs occa-
sioned by
refusal or ob-
jection under
rr. 13, 14.

(o) *Stuart v. Balkis Company, re Metropolitan Electric Light Co.*,
53 L. J., Ch. Div. 790; 50 L. T. 54 L. J., Ch. Div. 253; 51 L. T.
479; 32 W. R. 676; see also *In* 816.

Order
XXXVII.
r. 16.

Depositions to
be transmitted
to Central
Office.

By r. 16, "When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed."

In probate actions they are carried into the Probate Registry, Somerset House.

R. 17.
Special report
by examiner.

By r. 17, "The person taking the examination of a witness under these rules may, and if need be shall, make a special report to the Court touching such examination and the conduct or absence of any witness or other person thereon, and the Court or a judge may direct such proceedings and make such order as upon the report they or he may think just."

R. 18.
Depositions
not to be
given in evi-
dence without
consent or by
leave of
judge.

By r. 18, "Except where by this order otherwise provided or directed by the Court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate."

R. 19.
Oaths.

By r. 19, "Any officer of the Court, or other person directed to take the examination of any witness or person, may administer oaths."

R. 20.
Attendance of
witness under
subpoena for
examination
or to produce
documents.

By r. 20, "Any party in any cause or matter may by *subpoena ad testificandum* or *duces tecum* require the attendance of any witness before an officer of the Court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any

party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such *subpœna* to attend before such officer or person for cross-examination."

Order
XXXVII.
r. 20.

By r. 21, "Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial."

R. 21.
Evidence
taken after
trial.

By r. 22, "The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage."

R. 22.
Practice as
to taking
evidence at
any stage of
a cause or
matter.

By r. 23, "The practice of the Court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the Court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case."

R. 23.
Special direc-
tions as to
taking evi-
dence.

By r. 24, "No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the Court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf."

R. 24.
Notice to use
affidavit or
depositions
at trial.

By r. 25, "All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter" (*p*).

R. 25.
Evidence in
proceedings
subsequent
to trial.

By r. 26, "Where it is intended to sue out a *subpœna*, a *præcipe* for that purpose, in the Form No. 21, in Appendix G. (*q*), and containing the name or firm and the place of business or residence of the solicitor intending to sue

R. 26.
Subpœna.

(*p*) For cases on practice under this Order generally, see Annual Practice, 1892, pp. 649—668.
(*q*) See form in Appendix.

Order
XXXVII.
r. 26.

Form of
præcipe for a
subpæna.

R. 27.

Form of writ
of *subpæna*.

R. 28.

Subpæna for
attendance of
witness in
Chambers.

R. 29.

Number of
persons in a
subpæna other
than a *sub-
pæna duces
tecum*.

R. 30.

Number of
persons in
*subpæna duces
tecum*.

R. 31.

Correction of
errors in *sub-
pæna*.

R. 32.

Service of
subpæna.

R. 33.

Affidavit to
prove service
of *subpæna*.

out the same, and, where such solicitor is agent only, then also the name or firm and place of business or residence of the principal solicitor, shall in all cases be delivered and filed in the Central Office."

By r. 27, "A writ of *subpæna* shall be in one of the Forms 1 to 7 in Appendix J., with such variations as circumstances may require" (*q*).

By r. 28, "Where a *subpæna* is required for the attendance of a witness for the purpose of proceedings in Chambers, such *subpæna* shall issue from the Central Office upon a note from the judge" (*r*).

By r. 29, "Every *subpæna* other than a *subpæna duces tecum* shall contain three names where necessary or required, but may contain any larger number of names."

By r. 30, "No more than three persons shall be included in one *subpæna duces tecum*, and the party suing out the same shall be at liberty to sue out a *subpæna* for each person if it shall be deemed necessary or desirable."

By r. 31, "In the interval between the suing out and service of any *subpæna*, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ re-sealed upon leaving a corrected *præcipe* of such *subpæna* marked with the words 'altered and re-sealed,' and signed with the name and address of the solicitor suing out the same."

By r. 32, "The service of a *subpæna* shall be effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ."

By r. 33, "Affidavits filed for the purpose of proving the service of a *subpæna* upon any defendant must state when, where, and how, and by whom, such service was effected."

(*q*) See forms in Appendix.

(*r*) All *subpænas* in probate

actions are issued from the Probate Registry.—[D.]

By r. 34, "The service of any *subpœna* shall be of no validity if not made within twelve weeks after the *teste* of the writ" (s).

By Order XXXVIII. r. 1, "Upon any motion, petition, or summons, evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit."

By r. 2, "Every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer."

A matter in the Probate Division, after giving the full title of the Division, should be headed,
If no action is pending,

"In the goods of A. B."

If an action is pending,

"In the goods of A. B.,

"C. v. D."

By r. 3, "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same."

By r. 4, "Affidavits sworn in England shall be sworn before a judge, district registrar, commissioner to administer oaths, or officer empowered under these rules to administer oaths."

(s) For cases on the practice as to subpœnas, see Annual Practice, 1892, pp. 668, 669.

Order
XXXVII.
r. 34.

Within what
time *subpœna*
to be served.

Order
XXXVIII.
r. 1.

Affidavits and
depositions.

Evidence on
motions, &c.

R. 2.

Title of
affidavits.

R. 3.

Contents of
affidavits.

R. 4.

Before whom
affidavits may
be sworn.

Order
XXXVIII.
r. 5.

Time and
place of
taking affi-
davits.

By r. 5, "Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgment of any deed or recognizance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the Court or a judge; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office."

R. 6.
Affidavits,
&c., how to
be sworn and
taken in Scot-
land, Ireland,
the Channel
Islands, colo-
nies, and
foreign parts.

By r. 6, "All examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, Court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such Court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document."

By German law a British consul is not allowed to administer an oath, and the witness must be sworn before a German judge (*t*).

R. 7.
Form of
affidavits.

By r. 7, "Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed book-wise. No costs shall be allowed for any

(*t*) *In the goods of Fawcus*, 9 P. D. 241; 54 L. J., P. D. & A. 47; 33 W. R. 313; 48 J. P. 743.

affidavit or part of an affidavit substantially departing from this rule.”

By r. 8, “Every affidavit shall state the description and true place of abode of the deponent.”

By r. 9, “In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the ‘above-named’ deponents.”

By r. 10, “Every affidavit . . . used in probate actions shall be filed in the Probate Registry: . . . There shall be *indorsed on* every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court or a judge shall otherwise direct.”

By r. 11, “The Court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.”

By r. 12, “No affidavit having in the jurat or body thereof any interlineations, alteration, or erasure, shall without leave of the Court or a judge be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.”

By r. 13, “Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the

Order
XXXVIII.
r. 7.

R. 8.
Description
and abode of
deponent to
be stated.

R. 9.
Affidavits
made by two
or more
deponents.

R. 10.
Affidavits to
be filed in
proper office.

R. 11.
Scandalous
matter.

R. 12.
Alterations in
affidavits.

R. 13.
Affidavits by
illiterate or
blind persons.

Order
XXXVIII.
r. 13.

deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent."

R. 14.
Use of defective affidavit.

By r. 14, "The Court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received."

R. 15.
Stamping of affidavits, and use of office copies.

By r. 15, "In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in Court or in chambers, who shall send it to be filed. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office."

R. 16.
Affidavit sworn before solicitor or his agent.

By r. 16, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself."

R. 17.
Affidavit sworn before clerk or partner of solicitor.

By r. 17, "Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner."

R. 18.
Special times for filing affidavits.

By r. 18, "Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the Court or a judge."

R. 19.
Affidavits in support of *ex parte* applications.

By r. 19, "Except by leave of the Court or a judge, no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order

was applied for, and produced or filed at the time of making the motion" (*u*). Order
XXXVIII.
r. 19.

Affidavits are also extensively used in non-contentious business, and as to such the practice is not affected by the Judicature Acts.

By r. 51, Probate Rules (Non-contentious Business), every affidavit is to be drawn in the first person, and the *addition and true place of abode (sic)* of the deponent is to be inserted therein. Probate
Rules.
P. R.,
N.-C. B.
r. 51.

By r. 52, Probate Rules (Non-contentious Business), wherever an affidavit is made by two or more persons the names of the several persons making it are to be written in the jurat. P. R.,
N.-C. B.
r. 52.

R. 53, Probate Rules (Non-contentious Business), forbids the admission of any affidavit when a material part is written upon an erasure or there is any interlineation or erasure in the jurat. P. R.,
N.-C. B.
r. 53.

By r. 54, Probate Rules (Non-contentious Business), where affidavits are made by persons who are blind or apparently illiterate, the authority before whom the affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same, and that such person seemed perfectly to understand the same, and signed it by mark or otherwise in the presence of the authority before whom the affidavit was made. P. R.,
N.-C. B.
r. 54.

By r. 55, Probate Rules (Non-contentious Business), no affidavit is to be deemed sufficient if sworn before the party in whose behalf it is offered, or before his solicitor, or before a partner or clerk of his solicitor; and by r. 56, solicitors acting for any other solicitor "shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting." P. R.,
N.-C. B.
r. 55.

Ibid.
R. 56.

By r. 57, Probate Rules (Non-contentious Business), affidavits made by subscribing witnesses are to show "the mode in which the said will or codicil was executed and attested." P. R.,
N.-C. B.
r. 57.

(*u*) For cases on practice under this Order, see Annual Practice, 1892, pp. 674—684.

Probate
Rules, Non-
contentious
Business,
r. 58.

By r. 58, Probate Rules (Non-Contentious Business), no affidavit is to be filed “(unless by leave of the judge) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the commissioner or other person before whom it was sworn.”

District
registries.

The rules affecting affidavits sworn in the district registries are Rules 64—71 (District Rules), inclusive.

Affidavits
sworn abroad.

Where a requisition had issued to persons in New South Wales, under the seal of the Prerogative Court of Canterbury, to swear an administration, it was held that the Court of Probate might decree administration on an affidavit sworn under such requisition (*x*).

Before
notary
abroad.

It was held an affidavit sworn before a notary abroad will not be admitted, unless it appears on affidavit that there was not at the place where it was sworn a British consul or other officer empowered by 18 & 19 Vict. c. 42, to take affidavits, and that a notary had by the law of such place authority to take affidavits; an affidavit in which the addition or place of abode of a deponent is not inserted will not be admitted (*y*).

But this decision seems now overruled; for the Court admitted a declaration on oath made in the presence of a notary public in France, although it was not shown that none of the authorities mentioned in the statute 18 & 19 Vict. c. 42, were resident in the place (*z*).

In an executor's or administrator's oath and affidavit for Commissioners of Inland Revenue, it is a sufficient description of a widow to describe her as “the lawful widow and relict of the said deceased” (*a*).

(*x*) *In the goods of Bedwell*, 1 S. 64; 14 L. T. 227; 14 W. R. 617. & T. 15; 27 L. J., P. & M. 8.

(*y*) *In the goods of Bernard*, 2 S. 621; 32 L. J., P. & M. 14; 7 L. T. & T. 489; 31 L. J., P. & M. 89; 394; 11 W. R. 171. See also *In the goods of Morgan*, 32 L. J., P. & M. 139; 11 W. R. 749.

(*z*) *In the goods of Lambert*, L. R., 1 P. & D. 138; 35 L. J., P. & M.

Affidavits having been sworn before the United States consul in Vera Cruz, as there was no English consul or diplomatic agent there, the Court held that it had no power to receive them (*b*).

Affidavits
sworn abroad.
Before
United States
consul.

When it was requisite to obtain probate in this country of a German will, and the necessary papers for the purpose, with due instructions, were forwarded to the executor, who was a German residing in Germany: they were returned by the executor accompanied by an affirmation made by him before the British vice-consul at Breslau, containing no statement that he had a conscientious objection to taking an oath, so as to bring him within the exception created by the Common Law Procedure Act, 1854, sect. 20: the Court held that the affirmation was defective, and refused to receive the papers (*c*).

Affirmation
in Germany.

A party propounding a will is bound to call one at least of the attesting witnesses, if he can be produced, to prove the due execution, and if such witness fails to prove the due execution he is bound to call the other, although he may know him to be an adverse witness (*d*).

Party pro-
pounding will
must call at
least one
attesting
witness.

Where two wills were in dispute, and as the result of a compromise a verdict and judgment were taken establishing the earlier will, and subsequently the party setting up the later will discovered that the earlier will was a forgery and obtained a verdict to that effect in the Chancery Division, the Court held that the parties setting up the earlier will were estopped from denying the forgery in a subsequent action in the Probate Division (*e*).

Forgery
proved in
action in
Chancery
Division.

Parties
estopped from
denying it in
action in
Probate
Division.

(*b*) *In the goods of De Salazar*, 21 W. R. 776.

Forster, 33 L. J., P. & M. 113;

(*c*) *In the goods of H. H. Prince Henry the 69th of Reuss-Kostritz*, 49 L. J., P. 67; 41 L. T. 803; 28 W. R. 398.

Owen v. Williams, 32 L. J., P. & M.

159; 9 L. T. 86; 11 W. R. 808;

Wright v. Rogers, L. R., 1 P. & D.

678; 38 L. J., P. & M. 67; 21

L. T. 156; 17 W. R. 833.

(*d*) *Coles v. Coles*, L. R., 1 P. & D. 70; 35 L. J., P. & M. 40; 13 L. T. 608; 14 W. R. 290. See also *Belbin v. Keats*, 1 S. & T. 148; 27 L. J., P. & M. 56; *Forster v.*

(*e*) *Priestman v. Thomas*, 9 P. D.

70; affd. on appeal, *Ibid.* 210; 53

L. J., P. D. & A. 109; 51 L. T.

843; 32 W. R. 842.

Evidence of
foreign law.

Expert.

Foreign
ambassador
or secretary
of legation.

Evidence of foreign law in the Probate Division must be supplied by some person who, from his having a professional status as a lawyer or otherwise in the country, the law of which is in question, is considered an expert. But a non-qualified person, although learned in the subject, cannot give evidence of foreign law. So the evidence of "a certified special pleader" as to Scotch law was refused (*g*).

The certificate of a foreign ambassador, given under the seal of the embassy (*h*), and an affidavit of a secretary of legation (*i*), have been accepted as proof of the validity of a foreign testamentary paper.

- (*g*) *In the goods of Bonelli*, 1 P. 8 L. T. 172; 11 W. R. 218.
D. 69. (*i*) *In the goods of Dost Aly Khan*,
(*h*) *In the goods of Klingemann*, 3 6 P. D. 6; 49 L. J., P. D. & A.
S. & T. 18; 32 L. J., P. & M. 16; 78; 29 W. R. 80.

CHAPTER XXVIII.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION IN
CONTENTIOUS BUSINESS—*continued.*APPEALS—TO COURT OF APPEAL FROM PROBATE DIVISION
—TO HOUSE OF LORDS—TO PROBATE DIVISION FROM
COUNTY COURTS.

By the Judicature Act, 1873, s. 49, “No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order.”

Jud. Act, 1873, s. 49.
What orders shall not be subject to appeal.

And by sect. 50, “Every order made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in Court, according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal” (a).

Ibid. s. 50.
As to discharging orders made in chambers.

By Order LVIII. (b) r. 1, “All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition,

Order LVIII. r. 1.
Appeal to be by rehearing and on motion.

(a) See *Rigg v. Hughes*, 9 P. D. 68; (b) See *Annual Practice*, 1892, 53 L. J., P. D. & A. 62; 50 L. T. pp. 915—946. 293; 32 W. R. 355.

- Order LVIII. case, or other formal proceeding other than such notice of
r. 1. motion shall be necessary. The appellant may by the
Appeal from notice of motion appeal from the whole or any part of any
part. judgment or order, and the notice of motion shall state
whether the whole or part only of such judgment or order
is complained of, and in the latter case shall specify such
part."
- R. 2. By r. 2, "The notice of appeal shall be served upon all
Notice of parties directly affected by the appeal, and it shall not be
appeal, necessary to serve parties not so affected; but the Court of
service of. Appeal may direct notice of the appeal to be served on all
or any parties to the action or other proceeding, or upon
any person not a party, and in the meantime may post-
pone or adjourn the hearing of the appeal upon such terms
as may be just, and may give such judgment and make
such order as might have been given or made if the per-
sons served with such notice had been originally parties.
- Amendment Any notice of appeal may be amended at any time as the
of. Court of Appeal may think fit."
- R. 3. By r. 3, "Notice of appeal from any judgment, whether
Time for. final or interlocutory shall be a fourteen days'
'14 days. notice, and notice of appeal from any interlocutory order
4 days. shall be a four days' notice."
- R. 4. By r. 4, "The Court of Appeal shall have all the powers
Power of and duties as to amendment and otherwise of the High
Court of Court, together with full discretionary power to receive
Appeal to further evidence upon questions of fact, such evidence to
amend; be either by oral examination in Court, by affidavit, or
by deposition taken before an examiner or commissioner.
Such further evidence may be given without special leave
upon interlocutory applications, or in any case as to
matters which have occurred after the date of the decision
from which the appeal is brought. Upon appeals from a
judgment after trial or hearing of any cause or matter
upon the merits, such further evidence (save as to matters
subsequent as aforesaid) shall be admitted on special
grounds only, and not without special leave of the Court.
- admit further evidence, or draw inferences of fact.

The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may be just.”

Order LVIII.
r. 4.

Costs of
appeal.

By r. 5, “If upon hearing of an appeal, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.”

R. 5.
Power to
order new
trial.

By r. 6, “It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.”

R. 6.
Appeal by
respondent.

By r. 7, “Subject to any special order which may be made notice by a respondent under the last preceding rule shall, in the case of any appeal from a final judgment, be an eight days’ notice, and in the case of an appeal from an interlocutory order a two days’ notice.”

R. 7.
Length of
notice of,
by
respondent.

By r. 8, “The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal

R. 8.
Setting down
appeal.

Order LVIII. the judgment or order or an office copy thereof, and shall
 r. 8. leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal."

R. 10. By r. 10, "Where an *ex parte* application has been refused
Ex parte applications. by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Court of Appeal may allow."

R. 11. By r. 11, "When any question of fact is involved in an
 Question of fact. appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:

Evidence. "(a.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed:

Judge's notes. "(b.) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient" (c).

R. 12. By r. 12, "Where evidence has not been printed in the
 Order to print evidence. Court below, the Court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order."

R. 13. By r. 13, "If, upon the hearing of an appeal, a question
 Evidence as to direction of judge to jury or assessors. arise as to the ruling or direction of the judge to a jury or

(c) See, as to this, *Annual Practice*, 1892, p. 933.

assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.” Order LVIII.
r. 13.

By r. 14, “No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just” (d). R. 14.
Interlocutory order not to prejudice appeal.

By r. 15, “No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal” (e). R. 15.
Time for appealing from interlocutory and final order.

Security for costs.

By r. 15A, “The time for appealing against an order made on the further consideration of a cause, and on the hearing of a summons to vary the certificate on which such order is made, shall be the same as the time for appealing against the order on further consideration.” R. 15A.
Time for appealing against order made on further consideration and on summons to vary.

By r. 16, “An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.” R. 16.
Stay of proceedings on appeal.

(d) See Annual Practice, 1892, p. 935. (e) See *ibid.*, pp. 935—943.

Order LVIII.
r. 17.

Applications
which may be
made either
to Court below
or C. A. to be
made first to
Court below.

R. 18.
Applications
to a single
judge.

Appeal to
the House of
Lords.

Appellate
Jur. Act,
1876, s. 3.

By r. 17, "Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or judge below."

By r. 18, "Every application to a judge of the Court of Appeal shall be by motion, and the provisions of Order LII. shall apply thereto."

From the Court of Appeal there is a final appeal to the House of Lords, which is regulated by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59).

By sect. 3, "Subject as in this Act mentioned, an appeal (*g*) shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say,

"(1) Of her Majesty's Court of Appeal in England; and

"(2) Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute; and

"(3) Of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute."

Sect. 4.
Form of ap-
peal to House
of Lords.

By sect. 4, "Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal."

Sect. 11.
Security for
costs.

By sect. 11, appeals to the House of Lords are to be "subject to such conditions . . . as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords."

The appeal to the House of Lords must be within one year from the date of the decree or order appealed against.

Appeal to House of Lords must be within one year.

The appellant must give security for costs to the amount of several hundred pounds. For particulars, see the Practice and Standing Orders of the House of Lords, Annual Digest, 1892, vol. 2, part v. See also Denison's Appeal Practice of the House of Lords.

Security for costs.

County Courts have a limited jurisdiction in probate matters. Such jurisdiction was originally conferred by sect. 54 of the Court of Probate Act, 1857, since repealed, and it is now regulated by sect. 10 of the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), by which it is enacted that "Where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate, in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for, had at the time of his death his fixed place of abode in one of the districts specified in Schedule (A.) to the said 'Court of Probate Act,' and that the personal estate in respect of which such probate or letters of administration are to be or have been granted exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of debts due and owing from the deceased, was at the time of his death under the value of 200*l.*, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of 300*l.* or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode, shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

County Court jurisdiction in probate matters.

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 54; C. P. Act, 1858 (21 & 22 Vict. c. 95), s. 10.

By sect. 55 of the Court of Probate Act, 1857 (20 & 21

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 55.

Registrar of
County Court
to transmit
certificate of
decree for
grant or
revocation of
probate.

Vict. c. 77), "On a decree being made by the judge of a County Court for the grant or revocation of a probate or administration in any such cause, the registrar of the County Court shall transmit to the district registrar of the district in which it shall have been sworn that the deceased had at the time of his decease his fixed place of abode a certificate under the seal of the County Court of such decree having been made, and thereupon, on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree."

Ibid. s. 56.

The judge of
the County
Court to
decide causes
and enforce
judgments as
in other cases.

By sect. 56, "The judge of any County Court before whom any disputed question shall be raised relating to matters and causes testamentary under this Act shall, subject to the rules and orders under this Act, have all the jurisdiction, power, and authority to decide the same and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the County Court."

Ibid. s. 57.

Affidavit of
the facts
giving the
County Court
jurisdiction to
be conclusive,
unless dis-
proved while
the matter
is pending.

By sect. 57, "The affidavit as to the place of abode and state of the property of a testator or intestate which is to give contentious jurisdiction to the judge of the County Court under the previous provisions shall, except as herein-after provided, be conclusive for the purpose of authorizing the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the jurisdiction of such judge or within any of the said districts at the time of his death, or by reason that the personal estate sworn to be under the value of two hundred pounds did in fact amount

to or exceed that value, or that the value of the real estate of or to which the deceased was seised or entitled beneficially at the time of his death amounted to or exceeded three hundred pounds: provided, that where it shall be shown to the judge of a County Court before whom any matter is pending under this Act that the place of abode or state of the property of the testator or intestate in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration has not been correctly stated in the affidavit, and if correctly stated would not have authorized him to exercise such contentious jurisdiction, he shall stay all further proceedings in his Court in the matter, leaving any party to apply to the Court of Probate for such grant or revocation, and making such order as to the costs of the proceedings before him as he may think just.”

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 67.

By sect. 58, “Any party who shall be dissatisfied with the determination of the judge of the County Court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate, in such manner and subject to such regulations as may be provided by the rules and orders to be made under this Act, and the decision of the Court of Probate on such appeal shall be final.”

Ibid. s. 58.

As to appeals
from County
Courts.

Order LIX. r. 4, “Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from inferior Courts under section 45 of the principal Act. All Probate and Admiralty appeals from inferior Courts, and from justices shall be to a Divisional Court of the Probate, Divorce and Admiralty Division”

Order LIX.
r. 4.

Hearing and
entry of
appeals from
inferior
Courts.

By sect. 59, “It shall not be obligatory on any person to apply for probate or administration to any district registry, or through any County Court, but in every case such application may be made through the principal registry of the Court of Probate, wherever the testator or

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 59.

Not obliga-
tory to apply
for probate,
&c., to district

C. P. Act,
1857 (20 & 21
Vict. c. 77),
s. 59.

registries or
County Court,
but may in
every case be
made to Court
of Probate.

C. P. Act,
1858, s. 11.

Sect. 59 of
20 & 21 Vict.
c. 77, to
apply to ap-
plications for
revocation of
grants.

Probate
Division can-
not regulate
mode of trial
in County
Court.

Value of
real estate.
How
estimated.

Case will not
be sent from
Probate
Division to
County Court

intestate may at the time of his death have had his fixed place of abode: provided, that where in any contentious matter arising out of any such application it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, the Court of Probate may send the cause to such County Court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his Court in the first instance."

Sect. 11 of the Court of Probate Act, 1858, repeals sect. 54 of the Court of Probate Act, 1857.

By sect. 12, "The said Court of Probate Act, section fifty-nine, shall, so far as the County Courts or a judge thereof are concerned, apply to an application for the revocation of a grant of probate or administration as well as to an application for any such grant."

The Probate Division has no power to order the mode of trial of a cause sent by it to be tried in a County Court (*f*).

In estimating the value of the real estate to which a deceased was entitled at the time of his death for the purpose of deciding whether the County Court has jurisdiction, charges upon such estate cannot be taken into consideration. If the estate be of the value of 300*l.*, but the value of the deceased's interest in it is reduced by mortgage to less than 300*l.*, the County Court has no jurisdiction (*g*).

Where proceedings have been commenced in the Probate Division, the Court will receive evidence from both sides as to the state of the property and the place of the abode

(*f*) *Norris v. Allen*, 2 S. & T. 601; 32 L. J., P. & M. 3; 7 L. T. 338; 11 W. R. 32. See also *Macleur v. Macleur*, L. R., 1 P. & D. 604; 37 L. J., P. & M. 68.

(*g*) *Davies v. Brecknell*, L. R., 2 P. & D. 177; 40 L. J., P. & M. 15; 23 L. T. 569; 19 W. R. 136. See also *Thomas v. Nurse*, 39 L. J., P. & M. 80.

of the deceased, before it determines whether or not it will send the cause to the proper County Court (*h*).

Where a testamentary cause in which a County Court has jurisdiction has been commenced in, or has been transferred to a County Court, the Probate Division has no power to grant a new trial or to make any order in the cause unless it is brought before it by way of an appeal from the determination of the judge of the County Court in point of law or upon admission or rejection of evidence (*i*).

When a County Court has jurisdiction, the Court may, though all the parties to the action desire it to be tried at the assizes, direct it to be tried in the County Court. So where, on an application acquiesced in by all parties to the cause, to direct an issue in a testamentary suit to be tried at the assizes, it appeared from affidavits that the whole property did not amount to 300*l.*, the Court required that it should also appear that the personalty was not under 200*l.*, so as to show that the County Court had no jurisdiction (*k*).

Where the party opposing a will has given notice under Rule 41 of the Contentious Business Rules, 1862, that he merely insists on the will being proved in solemn form, and only intends to cross-examine the witnesses, the Court has no jurisdiction to condemn him in costs, such power only existing where the party giving the notice has taken proceedings to call in the probate. And the decision of a County Court judge, who had condemned a party in costs, was reversed accordingly by a Divisional Court of the Probate Division (*l*).

(*h*) *Slater v. Alvey*, L. R., 2 P. & D. 154; 23 L. T. 324; 18 W. R. 1103.

(*i*) *Zeally v. Veryard*, L. R., 1 P. & D. 195; 35 L. J., P. & M. 127; 14 L. T. 769; 14 W. R. 970.

(*k*) *Dunn v. Dunn*, 1 S. & T. 521; 30 L. J., P. & M. 40; 8 W. R. 259.

(*l*) *Leigh v. Green*, L. R. 1892, P. D. 17; 61 L. J., P. D. & A.

without hearing evidence as to property from both sides.

Probate Division cannot grant new trial in County Court case, except on appeal.

Court may direct trial in County Court though parties desire it at assizes.

Probate Rules (Contentious Business) binding on County Court judge.

CHAPTER XXIX.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION IN
CONTENTIOUS BUSINESS—*continued.*

ENFORCING ORDERS—MISCELLANEOUS POINTS OF PRACTICE.

Execution.

THE Probate Division is armed with the same powers of enforcing its decrees and orders as the other Divisions of the High Court of Justice.

Order XLII.

r. 2.

Waiver of
conditional
judgment
or order.

By Order XLII. (a) r. 2, "Where any person who has obtained any judgment or order upon condition does not perform or comply with such condition, he shall be considered to have waived or abandoned such judgment or order so far as the same is beneficial to himself, and any other person interested in the matter may on breach or non-performance of the condition take either such proceedings as the judgment or order may in such case warrant, or such proceedings as might have been taken if no such judgment or order had been made, unless the Court or a judge shall otherwise direct."

R. 3.

Enforcing
judgment for
payment of
money.

By r. 3, "A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof" (b).

Committal
orders.

It must be remembered that the Probate Division does not commit to prison for refusal to obey an order for pay-

(a) See Annual Practice, 1892, pp. 705—730.

(b) It is scarcely necessary to say that the sums of money ordered to

be paid under judgments in the Probate Division are usually confined to costs.

ment of money. Such orders for commitment are only made in bankruptcy under the Debtors Act, 1869, s. 5 (c). Order XLII.

By r. 4, "A judgment for the payment of money into Court may be enforced by writ of sequestration, or, in cases in which attachment is authorized by law, by attachment." R. 4.
Judgment for payment into Court.

By r. 7, "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal." R. 7.
Judgment to do or abstain from any act.

By r. 8, "In these rules the term 'writ of execution' shall include writs of *fiery facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term 'issuing execution against any party' shall mean the issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case." R. 8.
Meaning of "writ of execution," &c.

R. 9 relates to execution where a judgment has been pronounced subject to the fulfilment of some condition or contingency (d). R. 9.

By r. 11, "No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment or order upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the creditor to execution." R. 11.
Writ issued on production of judgment.

By r. 12, "No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to" R. 12.
Præcipe for writ of execution.

(c) See Annual Practice, 1892, p. 706. In case of a solicitor ordered to refund balance of money received by him after taxation of

his bill, the Probate Division will order an attachment.—[D.]

(d) See Annual Practice, 1892, p. 713.

Order XLII.
r. 12.

be issued, the names of the parties against whom, or of the firm against whose goods, the execution is to be issued; and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix G. (e) shall be used, with such variations as circumstances may require."

R. 13.
Indorsement
on writ of
execution.

By r. 13, "Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be."

R. 14.
Date and form
of writ.

By r. 14, "Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix H. (f) shall be used, with such variations as circumstances may require."

R. 15.
Expenses of
execution.

By r. 15, "In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution over and above the sum recovered."

R. 16.

R. 16 provides that the amount of money and interest to be recovered shall be indorsed on the writ of execution (g).

R. 17.
Time to sue
out *fi. fa.* or
elegit to
enforce pay-
ment of
money or
costs.

By r. 17, "Every person to whom any sum of money or any costs shall be payable under a judgment or order shall, as soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fi. fa.*

(e) See form in Appendix.

(f) See form in Appendix.

(g) See Annual Practice, 1892,
p. 717.

or one or more writ or writs of *elegit* to enforce payment thereof, subject nevertheless as follows:—

Ord. XLII.
r. 17.

“(a.) If the judgment or order is for payment within a period therein mentioned, no such writ as afore-said shall be issued until after the expiration of such period :

“(b.) The Court or a judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.”

R. 18 is only applicable where there is a judgment for a specific sum of money, apart from costs (*h*).

R. 18.

By r. 19, “A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of land, may issue execution in fourteen days, unless the Court or a judge shall order execution to issue at an earlier or later date with or without terms.”

R. 19.

Time for execution except for money or costs.

By r. 20, “A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinbefore provided ; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the Court ; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.”

R. 20.

Renewal of writ.

By r. 21, “The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.”

R. 21.

Evidence of renewal.

Ord. XLII.
R. 22.
Execution to
issue within
six years.

By r. 22, "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order."

R. 24.
Orders enforceable like judgments.

By r. 24, "Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."

R. 25.
Order of commitment under Debtors Act, 1869.

By r. 25, "An order of commitment under the Debtors Act, 1869, shall bear date on the day on which such order was made, and shall continue in force for one year from such date and no longer; but it may be renewed in the manner provided for writs of execution by Rule 20 of this Order."

R. 26.

R. 26 relates to execution where an order is made in favour of or against a person not a party to any cause or matter (*i*).

R. 29.
Order of issue of writs.
Ord. XLIII.
Writs of *feri facias*, *elegit*, and sequestration.

By r. 29, "Nothing in this Order shall affect the order in which writs of execution may be issued."

Order XLIII. relates to writs of *feri facias*, *elegit*, and sequestration.

R. 1.
Effect and manner of execution of.
Ord. XLIV.
r. 1.
Attachment.

By r. 1, "Writs of *feri facias* and *elegit* shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed" (*k*).

By Order XLIV. r. 1, "A writ of attachment shall have the same effect as a writ of attachment issued out of the Chancery Division has heretofore had" (*k*).

R. 2.
Not without leave.

By r. 2, "No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued" (*l*).

In the Probate Division, an application to attach any

(*i*) See Annual Practice, 1892, p. 724.

(*k*) *Ibid.*, pp. 730—746.

(*l*) See Annual Practice, 1892, pp. 740—746.

person must be by motion in open Court, and the notice of motion must be personally served (*m*).

Notice of motion to attach must be personally served.

Where a person served with a subpoena under 20 & 21 Vict. c. 77, s. 26, to bring in a testamentary paper failed to comply with it, the Court held that, under this rule, the party proceeded against must have notice of the application (*n*).

C. P. Act, 1857 (20 & 21 Vict. c. 77), s. 26.

The following are some of the cases which have been decided in the old Probate Court and in the Probate Division on the subject of attachment for contempt in disobeying an order of the Court.

Attachment for contempt.

In the Ecclesiastical Court an executor, cited by a creditor to take probate of a will, and assigned to do so, could not be pronounced in contempt for non-compliance with the assignation, at the suit of the creditor (*o*).

Executor ordered to take probate in Ecclesiastical Court.

Where the executors of a will intermeddled in the estate and effects of their testator, without taking probate of the instrument, a citation having been served upon them to enter an appearance and take probate, they entered an appearance but took no further steps in the matter. The Court refused to grant an attachment against them for contempt in not obeying the citation, but directed a peremptory order to be served upon them to take probate within ten days from the date of the order (*p*).

Executor intermeddling without taking probate.

A married woman may be attached for non-compliance with a citation, calling upon her to file an inventory in the registry of an estate of which she is administratrix (*q*).

Married woman refusing to file inventory.

The Court granted an order for an attachment against A. for disobedience of a subpoena, to bring in a will; but

W. R. 43.

(*o*) *Watson v. Tomkins*, 1 No. of Ca. Ecc. 313.

(*p*) *Mordaunt v. Clarke*, L. R., 1 P. & D. 592; 38 L. J., P. & M. 45; 19 L. T. 610.

(*q*) *Baker v. Baker*, 2 S. & T. 380; 29 L. J., P. & M. 138.

(*m*) As to personal service in other divisions, see *Mann v. Perry*, 50 L. J., Ch. D. 251; 44 L. T. 248; *Hampden v. Wallis*, 26 Ch. D. 746; 54 L. J., Ch. D. 83; 50 L. T. 515; 32 W. R. 808.

(*n*) See Annual Practice, 1892, pp. 746—749; *Baigent v. Baigent*, 1 P. D. 421; 33 L. T. 462; 24

Attachment
for contempt.

directed that the attachment should lie in the registry for eight days after notice to A. of its having been issued, before proceedings should be taken to enforce it (*r*).

Disobedience
to subpoena
to bring tes-
tamentary
paper into
registry.

When a subpoena has been personally served upon an individual to bring in a testamentary paper, and such individual fails to comply therewith, the Court will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in Court to be examined in reference to his possession of such paper (*s*).

Order for
disobedience
to which it is
proposed to
attach must
have been per-
sonally served.
As to payment
of costs before
discharge
from custody.

As a general rule, an attachment for disobeying an order of the Court will not be granted unless the order has been personally served (*t*).

An administrator in custody under an attachment, obtained by the persons entitled in distribution, for not filing an inventory, is not entitled to be discharged from custody upon his filing such inventory, except on payment of costs (*u*).

Disobedience
to order to
pay money.

As the Court no longer attaches for contempt for disobedience to an order to pay money only, the cases coming under that head are no longer precedents, and have, therefore, been omitted.

Persons acting
in a fiduciary
capacity.
Debtors Act,
1869.

Persons, however, acting in a fiduciary capacity are not considered to be protected by the Debtors Act. So, where letters of administration had been granted to the widow upon the suggestion of her deceased husband's intestacy, and she had received a sum of money, part of his property: in an action propounding a will of the deceased, the letters of administration were called in, and she was ordered to pay the sum of money to the administrator pending suit: having acted in a fiduciary capacity, she was held to be not protected by the Debtors Act, 1869, and was liable to attachment for not obeying the order (*x*).

(*r*) *Simmons v. Deane*, 27 L. J., 437; 33 L. J., P. & M. 127.
P. & M. 103.

(*u*) *Marshman v. Brookes*, 32 L.

(*s*) *Parkinson v. Thornton*, 27 J., P. & M. 95.

L. J., P. & M. 3.

(*x*) *Tinnuchi v. Smart*, 10 P. D.

(*t*) *Williams v. Davies*, 3 S. & T. 184; 54 L. J., P. D. & A. 92;

The following are the Probate Court Rules (Contentious Business) applicable to writs of attachment. Probate Rules, C. B.

R. 107. "Applications for writs of attachment, and also for writs of *fiery facias* and of sequestration, must be made to the judge by motion in Court." R. 107. Writs for attachment and other writs.

R. 108. "Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved and signed by one of the Registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the judge to sign such writs." R. 108.

R. 109. "Any person in custody under a writ of attachment may apply for his or her discharge to the judge if the Court be then sitting; if not, then to one of the registrars, who for good cause shown shall have power to order such discharge." R. 109.

Order XLV. relates to attachment of debts and garnishee orders (*y*). Ord. XLV. Attachment of debts.

Order XLVI. relates to charging orders, distringas, and stop orders (*z*). Ord. XLVI. Charging orders, distringas, &c.

Order XLVII. relates to writ of possession (*a*).

Order XLVIII. relates to writ of delivery for recovery of property other than land or money (*b*). Ord. XLVIII. Writ of possession.

By Order XLIX. (*c*) r. 3, "Any cause or matter may, at any stage, be transferred from one division to another by an order made by the Court or any judge of the division to which the cause or matter is assigned: Provided that no such transfer shall be made without the consent of the president of the division to which the cause or matter is proposed to be transferred." Ord. XLIX. Transfer from one division to another by order of Court or judge.

34 W. R. 46. See also, as to persons acting in a fiduciary capacity, *In re Gent-Davis*, 40 Ch. D. 190; 58 L. J., Ch. D. 162; 60 L. T. 355; 37 W. R. 151; *In re Walker*, 60 L. J., Ch. D. 25; 63 L. T. 237; 38 W. R. 766. (*y*) See Annual Practice, 1892, pp. 749—757. (*z*) *Ibid.*, pp. 758—768. (*a*) *Ibid.*, pp. 769, 770. (*b*) *Ibid.*, pp. 770, 771. (*c*) *Ibid.*, pp. 785—792.

Ord. L. r. 1a.
Interlocutory
orders as to
mandamus,
injunctions,
or interim
preservation
of property,
&c.

Early trial
of cause.

By order L. (d) r. 1A, "Whenever an application shall be made before trial for an injunction or other order, and on the opening of such application, or at any time during the hearing thereof, it shall appear to the judge that the matter in controversy in the cause or matter is one which can be most conveniently dealt with by an early trial, without first going into the whole merits on affidavit or other evidence for the purposes of the application, it shall be lawful for the judge to make an order for such trial accordingly, and to direct such trial to be held at the next or any other assizes for any place, if from local or other circumstances it shall appear to him to be convenient so to do, and in the meantime to make such order as the justice of the case may require."

R. 2.

Order for sale
of perishable
goods, &c.

By r. 2, "It shall be lawful for the Court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

R. 3.

Detention,
preservation,
or inspection
of property,
the subject
of an action.

By r. 3, "It shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

By r. 6, "An application for an order under section 25, sub-section 8, of the principal Act, or under Rules 2 or 3 of this Order, may be made to the Court or a judge by any party. If the application be by the plaintiff for an order under the said sub-section 8, it may be made either *ex parte* or with notice, and if for an order under Rules 2 or 3 of this Order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

Ord. L. r. 6.
Application
under J. A.
1873, s. 25 (8),
or rules 2 or 3,
supra.

Judicature Act, 1873, *sect.* 25 (8).—This sub-section provides as follows:—

Jud. Act,
1873, s. 25,
sub-s. (8).

"A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable" (e).

By r. 11, "No writ of injunction shall be issued. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had."

Ord. L. r. 11.
Injunction to
be by judg-
ment or order.

By r. 12, "In any cause or matter in which an injunction has been or might have been claimed, the plaintiff may,

R. 12.
Injunction

Ord. L. r. 12. before or after judgment, apply for an injunction to against repetition of wrongful act or breach of contract. restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and the Court or a judge may grant the injunction, either upon or without terms, as may be just."

The rest of Order L. deals with the rules as to receivers appointed in the other divisions of the High Court (*f*).

Ord. LX.
Officers.

Order LX. regulates the officers of the High Court (*g*).

Ord. LXIII.
r. 1.

Sittings and
vacations.
Sittings of
Court of
Appeal and
High Court
of Justice.

By Order LXIII. (*h*) r. 1, "The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings. The Michaelmas sittings shall commence on the 2nd of November and terminate on the 21st of December; the Hilary sittings shall commence on the 11th of January and terminate on the Wednesday before Easter; the Easter sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whit Sunday; and the Trinity sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August."

R. 2.
Queen's
birthday.

By r. 2, "It shall not be necessary for the Court of Appeal or the High Court of Justice to sit on the day appointed to be kept as the Queen's Birthday."

R. 3.
Length of
sittings of
Supreme
Court offices.

By r. 3, "The sittings of the several offices of the Supreme Court shall extend over the whole of the four periods between the vacations."

R. 4.
Vacations in
Courts and
offices of
Supreme
Court.

By r. 4, "The vacations to be observed in the several Courts and offices of the Supreme Court shall be four in every year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation."

(*f*) See Annual Practice, 1892,
pp. 812—826.

(*g*) *Ibid.* p. 953.

(*h*) *Ibid.* pp. 967—970.

The Long vacation shall commence on the 10th of August and terminate on the 24th of October: the Christmas vacation shall commence on the 24th of December and terminate on the 6th of January: the Easter vacation shall commence on Good Friday and terminate on Easter Tuesday: and the Whitsun vacation shall commence on the Saturday before Whit Sunday and shall terminate on the Tuesday after Whit Sunday.”

By r. 5, “The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.”

Ord. LXIII.
r. 4.

R. 5.
First and
last days
inclusive.

By r. 6, “The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Easter Eve, Monday and Tuesday in Easter Week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.”

R. 6.
Days on
which offices
are to be
closed.

By r. 8, “The offices of the Supreme Court (including the judges’ chambers) shall, save as hereinafter mentioned, close on Saturdays at two o’clock.”

R. 8.
Close time on
Saturdays.

By r. 9, “The office hours in the several offices of the Supreme Court, other than the Summons and Order, Crown Office, and Associates Departments of the Central Office, shall be from ten in the forenoon to four in the afternoon, except on Saturday and in vacation, when the offices shall close at two in the afternoon. In the excepted departments the hours shall be from eleven in the forenoon to five in the afternoon, except on Saturday and in vacation, when the hours shall be from eleven in the forenoon to three in the afternoon.”

R. 9.
Office hours.

By r. 11, “Two of the judges of the High Court shall be selected at the commencement of each long vacation for the hearing in London or Middlesex, during vacation, of all such applications as may require to be immediately or promptly heard. Such two judges shall act as vacation judges for one year from their appointment. In the

R. 11.
Appointment
of vacation
judges.

Ord. LXIII.
r. 11. absence of arrangement between the judges, the two vacation judges shall be the judges last appointed (whether as judges of the said High Court or of any Court whose jurisdiction is by the principal Act transferred to the said High Court) who have not already served as vacation judges of any such Court, and if there shall not be two judges for the time being of the said High Court who shall not have so served, then the two vacation judges shall be the judge (if any) who has not so served and the senior judge or judges who has or have so served once only according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a vacation judge."

R. 12.
Sittings of
vacation
judges. By r. 12, "The vacation judges may sit either separately or together as a Divisional Court as occasion shall require, and may hear and dispose of all causes, matters, and other business, to whichever division the same may be assigned.

Appeal from
orders. No order made by a vacation judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or the judge who made the order. Any other judge of the High Court may sit in vacation for any vacation judge."

R. 15.
Interval
between
sittings not
vacation. By r. 15, "Any interval between the sittings of the High Court or any division thereof, not included in a vacation, shall, so far as the disposal of business by the vacation judges is concerned, be deemed to be a portion of the vacation."

Ord. LXIV.
r. 1.
Time.
"Month"
means calen-
dar month. By Order LXIV. (i) r. 1, "Where by these rules, or by any judgment or order given or made after the commencement of the principal Act, time for doing any act or taking any proceeding is limited by months, and where the word 'month' occurs in any document which is part of any legal procedure under these rules, such time shall be computed by calendar months, unless otherwise expressed."

(i) See Annual Practice, 1892, pp. 971—980.

By r. 2, "Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time."

Ord. LXIV.
r. 2.
Exclusion of
Sundays, &c.

By r. 3, "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

R. 3.
Time expiring
on Sunday or
close day.

By r. 4, "No pleadings shall be amended or delivered in the long vacation, unless directed by a Court or a judge."

R. 4.
No delivery,
&c., of plead-
ing in long
vacation.

By r. 5, "The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading, unless otherwise directed by the Court or a judge."

R. 5.
Long vaca-
tion not to be
reckoned in
time for deli-
very, &c., of
pleadings.

By r. 6, "The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceeding in the cause or matter."

R. 6.
Time for
giving secu-
rity for costs,
when not to
be reckoned.

By r. 7, "A Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

R. 7.
Power of
Court or
judge to
enlarge or
abridge time.

By r. 8, "The time for delivering, amending, or filing any pleading, answer, or other document may be enlarged by consent in writing, without application to the Court or a judge."

R. 8.
Enlargement
of time by
consent.

Ord. LXIV.
r. 11.
Time of day
for service.

By r. 11, "Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any week-day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday."

R. 12.
Number of
days, how
computed.

By r. 12, "In any case in which any particular number of days, not expressed to be clear days, is prescribed by these rules, the same shall be reckoned exclusively of the first day and inclusively of the last day."

R. 13.
Length of
notice after
delay of one
year.

By r. 13, "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule."

Time Table.

TIME TABLE.

[This Table contains the times *limited* by Rules of Court for taking various proceedings, &c.]

Writ of summons to be served ; or renewed ; or concurrent writ issued	within twelve months after issue of original writ (O. 8, r. 1).
Renewed writ to be served ; or renewed	within six months from date of renewal (O. 8, r. 1).
Date of service to be indorsed on writ	within three days after service (O. 9, r. 15).
Appearance to writ (O. 12), or coun- terclaim (O. 21, r. 13), or notice of claim under O. 16, r. 49	within eight days after service (see O. 12, r. 8, n.).
„ where defendant not within jurisdiction	within time limited by order for service.
„ notice of	same day as appearance (O. 12, r. 9).

Delivery of statement of claim	six weeks after appearance (O. 20, r. 1 (d)); or, five weeks after notice under O. 20, r. 1 (c).	Ord. LXIV.
„ of defence, or defence and counterclaim	ten days after delivery of statement of claim (O. 21, rr. 6, 11).	<i>Time Table.</i>
„ where specially indorsed writ is served	ten days from <i>time limited for appearance, i.e.</i> , 18 days from service of writ (O. 21, r. 6; <i>Anlaby v. Prætorius</i> , 20 Q. B. D. 764).	
„ where writ not specially indorsed and no statement of claim received or required	ten days from <i>entry of appearance</i> (O. 21, r. 7).	
„ where leave given to defend under O. 14	eight days after order, unless otherwise specified (O. 21, r. 8).	
Pleadings.		
Reply to defence, or to defence and counterclaim	in Admiralty actions six days, in other actions twenty-one days after delivery of last defence (O. 23, r. 1).	
Reply to counterclaim	ten days after delivery of counterclaim or time for appearance there-to (O. 21, rr. 6, 14).	
Further defence or reply	eight days after ground of defence arises (O. 24, r. 2).	
Subsequent pleadings or joinder of issue	four days after previous pleading (O. 23, r. 3).	
Amendment of, without leave:—		
„ statement of claim	before reply or, where no defence, within four weeks from last appearance (O. 28, r. 2).	
„ set-off or counterclaim	before pleading to reply, or in twenty-eight days from defence (<i>ib.</i> , r. 3).	
Amendment of, by order	within time limited, or fourteen days from order (<i>ib.</i> , r. 7).	
Amendment of, application to disallow	eight days from delivery of amended pleading (<i>ib.</i> , r. 4).	
Interrogatories, delivery of		
„ answer to	any time after delivering statement of claim or defence (O. 31, r. 1; and see O. 27, r. 13).	
„ application to strike out	ten days after delivery of (O. 31, r. 8). seven days after service of (O. 31, r. 7).	
Inspection, of documents, notice (fixing time within three days from notice) to be given to party seeking production		
	within two days from receipt of notice to produce, if all documents are contained in affidavit; if not within four days (O. 31, r. 17).	
Discontinuance		
	before proceeding further, after delivery of defence (O. 26, r. 1).	

Ord. LXIV. <i>Time Table.</i>	Evidence. Filing and delivery of affidavits for use at trial of action	by plaintiff fourteen days after consent given (O. 38, r. 25). by defendant, fourteen days after delivery of plaintiff's list (<i>ib.</i> , r. 26). by plaintiff in reply, seven days after delivery of defendant's list (<i>ib.</i> , r. 27).
	Cross-examination at trial, service of notice of	fourteen days after time for delivery of affidavits in reply (O. 38, r. 28).
	<i>Subpœna ad test.</i> , service of	twelve weeks from teste (O. 37, r. 34).
	Trial , of action, notice of	by plaintiff, six weeks after close of pleadings (O. 36, rr. 11, 12). by defendant, after such six weeks (<i>ib.</i> , r. 12).
	,, of action, length of notice of	ten days before trial (or short notice four days) (<i>ib.</i> , r. 14).
	,, entry of action for	in London or Middlesex, six days after notice given (<i>ib.</i> , r. 16); elsewhere, seven days before commission day (<i>ib.</i> , r. 22B, and see r. 20).
	,, with jury, application for	ten days after notice of trial given (O. 36, r. 6).
	Judgment , after trial of action, motion for	by plaintiff, where judgment not entered at trial, ten days after trial (O. 40, r. 2).
	,, after trial of issues, motion for	by plaintiff, ten days after decision of issue; by defendant, after such ten days and within one year (<i>ib.</i> , rr. 7, 9).
	,, motion to add to	four weeks after service of (O. 16, r. 40).
	,, <i>execution of</i> , must issue	six years after judgment (O. 42, r. 22).
	,, ,, writ of, must be renewed	one year after issue (<i>ib.</i> , r. 20).
	New trial , motion for	eight days after trial in London or Middlesex (O. 39, r. 4); as to trial elsewhere, see <i>ib.</i>
	Appeals , to Court of Appeal (O. 58)	
	From final order or judgment made	one year from order or judgment perfected (O. 58, r. 15).
	Notice of appeal	fourteen days' notice (r. 3).
	,, cross-appeal	eight days' notice (r. 7).

By Order LXVI. (k) r. 1, "All notices required by these rules shall be in writing, unless expressly authorised by the Court or a judge to be given orally."

By r. 2, "All accounts, copies, and papers left at chambers, shall be written upon foolscap paper, bookwise, unless the nature of the document renders it impracticable."

By r. 3, "Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a-half wide."

By r. 4, "Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript."

By r. 5, "Where any written deposition of a witness has been filed, such deposition shall be printed, unless otherwise ordered."

By r. 6, "The rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed."

By r. 7, "Where, pursuant to these rules, any pleading, notice, special case, petition of right, deposition, or affidavit is to be printed, and where any printed or other office copy of any such document is to be taken, the following regulations shall be observed :

"(a.) The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by rule 3 of this Order :

"(b.) To enable the party printing to print any deposition or affidavit, the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only :

"(c.) The party printing shall, on demand in writing, furnish to any other party any number of printed

Ord. LXVI.
r. 1.
Notices, printing, paper, copies, office copies, minutes, &c.
All notices to be in writing.

R. 2.
Accounts, &c., to be written on foolscap.

R. 3.
Regulations for printing.

R. 4.
Affidavits printed or written.

R. 5.
Depositions for use at trial to be printed.

R. 6.
Except when previously used without being printed.

R. 7.
Regulations as to printing and copies.

Printing deposition or affidavit.

Written copy of deposition to be delivered by officer.

Payment for printed copies furnished to other parties.

Ord. LXVI.
r. 7.

copies, not exceeding ten, upon payment therefor at the rate of 1*d.* per folio for one copy, and $\frac{1}{2}$ *d.* per folio for every other copy :

Credit for
payment.

“(d.) As between a solicitor delivering any printed copies and his client, credit shall be given by the solicitor for the whole amount payable by any other party for such printed copies :

No charge
for written
copies.

“(e.) The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or a judge shall otherwise direct :

Marking
office copies.

“(f.) The party by or on whose behalf any deposition, affidavit, or certificate is filed, shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy ; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed :

Production of
office copies.

“(g.) The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is to produce the same upon every proceeding to which the same relates :

Party by
whom written
copies to be
furnished.

“(h.) Where any party is entitled to a copy of any deposition, affidavit, proceeding, or document filed or prepared by or on behalf of another party, which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same had been filed and prepared :

Application
for and deli-
very of copies.

“(i.) The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the Court or a judge may in any case direct, and is to be furnished

accordingly upon demand and payment of the proper charges : Ord. LXVI.
r. 7.

- “(j.) In the case of an *ex parte* application for an injunction or writ of *ne exeat regno*, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court or a judge : Copies of affidavits on *ex parte* application for injunction, &c.
- “(k.) It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy, and copy furnished to a party : Foot-note of affidavit.
- “(l.) The name and address of the party or solicitor by whom any copy is furnished is to be indorsed thereon in like manner as upon proceedings in Court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be : Indorsement address.

Party answerable for true copy.
- “(m.) The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies : Folios to be numbered.

Paper for written copies.
- “(n.) In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be payable to the solicitor Neglect to furnish copy in time.

Ord. LXVI.
r. 7.

so making default in respect of the copy so applied for:

Directions by the Court as to cost of printing and copies.

“(o.) Where, by any order of the Court (whether of appeal or otherwise) or a judge, any pleading, evidence, or other document is ordered to be printed, the Court or judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit.”

Ord. LXVII.
r. 1.

Service of orders, &c. Showing original order on service.

By Order LXVII. (l) r. 1, “Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited.”

R. 2.

Mode and time of service where not personal.

By r. 2, “All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite shall be sufficiently served if left within the prescribed hours at the address for service of the person to be served, as defined by Orders IV. and XII. (m), with any person resident at or belonging to such place.”

R. 3.

Service of notices from Supreme Court.

By r. 3, “Notices sent from any office of the Supreme Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service.”

R. 4.

Service where no appearance or no address for service.

By r. 4, “Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an address for service as required by Orders IV. and XII. (n), all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer.”

(l) See Annual Practice, 1892, pp. 1047—1052.

(m) *Ante*, pp. 383, and 390, 391.

(n) *Ibid*.

By r. 5, "Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons."

Ord. LXVII.
r. 5.
Manner of
personal
service.

By r. 6, "Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication is required by these rules or otherwise, and it is made to appear to the Court or a judge that prompt personal service cannot be effected, the Court or judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just."

R. 6.
Substituted
service.

By r. 7, "Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications which ought to be delivered to or served upon the party on whose behalf the notice is given shall thereafter be delivered to or served upon such solicitor."

R. 7.
Service upon
solicitor of
party for-
merly appear-
ing in person.

By r. 8, "Where a person who is not a party appears in any proceeding either before the Court or in chambers, service upon the solicitor in London by whom such person appears, whether such solicitor act as principal or agent, shall be deemed good service except in matters requiring personal service."

R. 8.
Service upon
London soli-
citor of person
not a party.

By r. 9, "Affidavits of service shall state when, where, and how and by whom, such service was effected."

R. 9.
Affidavits of
service.

By Order LXX. (o) r. 1, "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless

Ord. LXX.
r. 1.
Effect of non-
compliance.

Ord. LXX.

r. 1.

Non-compliance with rules not to render proceedings void.

R. 2.

Application to set aside for irregularity, when allowed.

R. 3.

Objections of irregularity.

R. 4.

Costs

Ord. LXXII.

r. 1.

General rules.

Repealed orders not revived.

R. 2.

Present practice.

R. 3.

Vacancy in offices of Lord Chancellor and Lord Chief Justice.

the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit."

By r. 2, "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

By r. 3, "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion."

By r. 4, "When a summons is taken out to set aside any process or proceeding for irregularity with costs, and the summons is dismissed generally without any special direction as to costs, it is to be understood as dismissed with costs."

By Order LXXII. (*p*) r. 1, "No order or rule annulled by any former order shall be revived by any of these rules, unless expressly so declared."

By r. 2, "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force."

By r. 3, "During the period of any vacancy in the office of Lord Chancellor, and when the great seal is not in commission, these rules shall operate as if wherever the words 'Lord Chancellor' are used, the words 'Lord Chief Justice of England' were used; and during the period of any vacancy in the office of Lord Chief Justice of England, as if wherever the words 'Lord Chief Justice of England' are used, the words 'Lord Chancellor' were used."

Under the exception in Order LXXII. r. 2, the rules of the Probate Court still remain in force where they do not clash with the Rules and Orders of the Supreme Court.

By r. 76, Contentious Business, "In contentious busi-

Probate Rules.

Rule 76, C. B.

ness, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be filed, unless by order of the judge or of a registrar. The form of inventory is given, No. 27" (q).

Probate Rules.
Rule 76, C. B.
Inventories.

By r. 79, Contentious Business, "A receiver of real estate pending suit is to give bond in the form given, No. 29, or in a form as near thereto as the circumstances of the case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the judge."

Rule 79, C. B.
Receiver of real estate.

By r. 96, Contentious Business, "Every administrator *pendente lite* and receiver of real estate shall exhibit an inventory and render an account of the property of the deceased which comes to his hands, and the accounts of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report, before the same are allowed by the Court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination."

Rule 96, C. B.
Accounts of administrators and receivers pending suit.

By r. 97, Contentious Business, "Persons applying for payment of money out of the registry must give forty-eight hours' notice of such application to the clerk of the papers. Such notice is to be in writing, and to set forth the day on which the money applied for was paid into the registry—the minute entered on receiving the same—the date and particulars of the order for payment to the applicant—and if the same be in payment of costs, the date of filing the bill for taxation and of the registrar's certificate. During the summer vacation money can only be paid out on certain days to be fixed by the registrars, notice whereof will be given in the registry" (r).

Rule 97, C. B.
Paying money out of Court.

(q) See *post*, Appendix.

(r) Payment of money out of

Court is now regulated by the rules of the High Court.—[D.]

Probate
Rules.
Rule 114,
C. B.
Change of
solicitors.

By r. 114, Contentious Business, "A party may obtain an order to change his or her . . . solicitor . . . upon application by summons to the judge or to the registrars in his absence" (s).

Rule 115,
C. B.

By r. 115, Contentious Business, "In case the former solicitor neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction and by order of the judge or of the registrars, proceed in the cause by the new solicitor without previous payment of such costs."

(s) This is now done simply by notice of change of solicitors.—[D.]

CHAPTER XXX.

OF PRACTICE AND PLEADING IN THE PROBATE DIVISION IN
CONTENTIOUS BUSINESS—*continued*.

COSTS IN PROBATE ACTIONS.

By Order LXV. (a) r. 1, "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also, that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

Ord. LXV.
r. 1.
Costs.
Costs to be in
the discretion
of the Court.

It must be remembered that, by rule 41 of the Probate Court Rules, 1862 (b), "*In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in*

Probate
Rules.
Rule 41, C. B.
Notice to
cross-examine
only.

(a) See Annual Practice, 1892, pp. 981—1044. (b) *Ante*, p. 404.

Probate
Rules.
Rule 41, C. B.

Ord. XXI.
r. 18.

Notice in pro-
bate actions.

respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court."

And that this rule has been perpetuated by Order XXI. r. 18 (c), "*In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances, according to the practice of the Court of Probate, before the principal Act came into operation.*"

These rules are binding on County Court judges in all probate actions that may come before them (d).

The cases bearing on these rules will be found in the concluding pages of this chapter (e).

Ord. LXV.
r. 2.

Costs of issues
to follow
event.

By r. 2, "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event."

R. 3.

By r. 3, "If a cause be removed from an inferior Court having jurisdiction in the cause, the costs in the Court below shall be costs in the cause."

R. 5.

Personal
liability of
solicitor to
pay costs.

By r. 5, "Where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court or judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court or judge shall think fit to award."

R. 6.

Security for
costs.

By r. 6, "In any cause or matter in which security for costs is required, the security shall be of such amount, and

(c) *Ante*, p. 404.

61 L. J., P. D. & A.

(d) *Leigh v. Green*, (1892) P. 17;

(e) *Post*, pp. 534 *et seq.*

be given at such times or in such manner and form, as a Court or judge shall direct." Ord. LXV.
r. 6.

By r. 6A, "A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction." R. 6a.
Security for costs by plaintiff temporarily within jurisdiction.

By r. 7, "Where a bond is to be given as security for costs, it shall, unless the Court or a judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court." R. 7.
Bond as security for costs.

By r. 11, "If in any case it shall appear to the Court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require. The Court or judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solicitor in the first place to show cause before such taxing officer, and may also, if they or he think fit, direct or authorise the official solicitor of the Supreme Court to attend and take part in such inquiry. Such notice (if any) of the proceedings or order shall be given to the client in such manner as the Court or judge may direct. Any costs of the official solicitor shall be paid by such parties, or out of such funds as the Court or a judge may direct; or, if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament."

Ord. LXV.

r. 13.

Costs of solicitor guardian *ad litem*.

By r. 13, "Where the Court or a judge appoints one of the solicitors of the Court to be guardian *ad litem* of an infant or person of unsound mind, the Court or judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in Court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require" (*f*).

R. 16.

Notice of taxing costs and copy bill.

By r. 16, "One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase (if any), shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor, in all cases where a notice to tax is necessary."

R. 17.

Where such notice unnecessary.

By r. 17, "Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his solicitor or guardian."

R. 19.

Taxing masters to assist each other.

By r. 19, "The taxing masters shall be respectively assistant to each other; and in the discharge of their duties, and, for the better despatch of the business of their respective offices, any taxing master may tax or assist in the taxation of a bill of costs which has been referred to any other taxing master for taxation, and for ascertaining what is due in respect of such costs, and in such case shall certify accordingly."

R. 19b.

Date of perfecting order to be certified.

By r. 19b, "The proper officer (*g*) by whom any order directing a taxation of costs shall be drawn up shall certify upon the order the date on which it was signed, entered, or otherwise perfected."

(*f*) See *White v. Duvernay*, where costs were ordered to be provided for by plaintiff; (1891) P. 290; 60 L. J., P. D. & A. 89.

(*g*) The proper officer for taxing bills of costs in the Probate Division is one of the registrars.

By r. 19c, "The solicitor having the carriage of the order shall leave at the office of the proper taxing officer within seven days (or such further time as the taxing officer may allow for reasons to be certified by him) after the order was signed, entered, or otherwise perfected, a copy of it and (annexed to such copy) a statement containing the names and addresses of the parties appearing in person, and of the solicitors of the parties not appearing in person; and in case of default no costs of drawing and copying the will, nor of attending the taxation, shall be allowed to the solicitor so failing."

Ord. LXV.
r. 19c.

Copy of order and statement of names of parties to be left at taxing office by party having carriage of order.

By r. 19d, "On the copy of the order being left with the taxing officer, he shall forthwith send by post to the parties appearing in person, and to the solicitors of the parties not appearing in person, a notice fixing a date before which the bills, the taxation whereof is directed by the order, shall (with all necessary papers and vouchers) be left for taxation, and a subsequent date on which the taxation shall be proceeded with."

R. 19d.

Notice of time for leaving bills of costs to be given by taxing master.

By r. 19e, "The taxation shall, if possible, be continued without interruption till completed, but if adjourned for any reason, notice of the adjournment shall be sent by the taxing master by post to any solicitor not present at the time of the adjournment, whose attendance he may require at the next appointment."

R. 19e.

Notice of adjournment of taxation.

By r. 19g, "Any solicitor who shall fail to leave his bill of costs (with the necessary papers and vouchers) within the time or extended time fixed by the taxing master for that purpose, or who shall in any way delay or impede the taxation shall, unless the taxing master otherwise directs, forfeit the fees to which he would otherwise be entitled for drawing his bill of costs and for attending the taxation, and the taxing master may also, if he shall think fit, exercise all or any of the powers vested in him by Regulations (28) and (55) of this Order."

R. 19g.

Powers of taxing officer where solicitor neglects to leave bill of costs within time fixed, or impedes or delays taxation.

By r. 19h, "In every bill of costs the professional charges shall be entered in a separate column from the

R. 19h.

Forms of bills of costs.

Ord. LXV. disbursements, and every column shall be cast before the bill is left for taxation."

R. 21. By r. 21, "When any book, paper, or document shall be
Memorandum of transmission. transmitted from the chambers of a judge to the office of a taxing master, a memorandum of such transmission shall be made and signed by the taxing master or the clerk of the taxing master, at whose request such book, paper, or document may be transmitted, and shall be delivered to the chief clerk of such judge; and when any such book, paper, or document shall be returned from the office of the taxing master to the judge's chambers, a memorandum of such return shall be made and signed by such chief clerk, or by one of his clerks, and shall be delivered to the taxing master."

R. 23. By r. 23, "Upon interlocutory applications, where the
Gross sum for costs on interlocutory applications. Court or a judge shall think fit to award costs to any party, the Court or judge may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid."

R. 27. By r. 27, "The following special allowances and general
Special allowances and general regulations. regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature (1) :—

Reg. 1. "1. As to writs of summons requiring special indorsement, and as to special cases, pleadings, and affidavits in
Allowances for pleadings, &c., in discretion of taxing master. answer to interrogatories, and other special affidavits and admissions under Order XXXII. r. 4, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, and attendances, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

Reg. 2. "2. As to drawing any pleading or other document,
Drawing pleadings. the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle.

(1) See Annual Practice, 1892, pp. 1018—1044.

- "3. As to instructions to sue or defend, or the preparation of briefs, if the taxing officer shall on special grounds consider the fee in either scale provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable. Ord. LXV. r. 27.
Reg. 3. Instructions to sue or defend, &c.
- "4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit. Reg. 4. Swearing affidavits.
- "5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over. Reg. 5. Drawing affidavits and attending deponent.
- "6. As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service. Reg. 6. Delivery of pleadings, &c.
- "7. As to perusals, the fees are not to apply where the same solicitor is for both parties. Reg. 7. Perusals.
- "8. Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed. Reg. 8. Separate answers or proceedings by the same solicitor.
- "9. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed. Reg. 9. Evidence.
- "10. As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the Reg. 10. Agency correspondence.

Ord. LXV. r. 27. taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper."

Reg. 12. "12. As to attendances at the judges' chambers, where, Special allowance for attendances at chambers in cases of difficulty, &c. from the length of the attendance, or from the difficulty of the case, the judge or master shall think the highest of the fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the judge or master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge or master may allow such fee, in lieu of the fee of 1*l.* 1*s.* provided, not exceeding 2*l.* 2*s.*, or where the higher scale is applicable, 3*l.* 3*s.*, or in proceedings to wind up a company, 5*l.* 5*s.*, as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding 10 guineas, as in his discretion he may think fit, instead of the fees of 2*l.* 2*s.*, 3*l.* 3*s.*, and 5*l.* 5*s.*

Reg. 13. "13. As to attendances at the judges' chambers, where Non-attendance or neglect of parties on proceedings in chambers. by reason of the non-attendance of any party (unless it be considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful

is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested. Ord. LXV.
r. 27.

“14. A folio is to comprise seventy-two words, every figure comprised in a column, or authorised to be used, being counted as one word. Reg. 14.
Folio to be
72 words.

“15. Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time. Reg. 15.
Fees to
counsel for
settling
pleadings,
affidavits, &c.,
and advising
thereon.

“16. As to counsel attending at judges' chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend. Reg. 16.
Counsel at
chambers.

“17. As to inspection of documents under Order XXXI. r. 15 (n), no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection. Reg. 17.
Inspection of
documents
under O. 31,
r. 15.

“18. As to taking copies of documents in possession of another party, or extracts therefrom, under rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4*d.* per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.” Reg. 18.
Copies of
documents,
allowance of
4*d.* per folio,
except where
solicitor
refuses pro-
duction.

“20. The Court or judge may, at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in Court or at chambers, and whether Reg. 20.
Disallowance
of costs of
improper,

Ord. LXV.
r. 27.

Reg. 20.
vexatious, or
unnecessary
matter in
documents or
proceedings.

the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit, or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties; and in any case where such question shall not have been raised before and dealt with by the Court or judge, it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so: and in the Queen's Bench Division the master shall make such order as may be required to effect the object of this regulation.

Reg. 21.
Set-off of
costs.

“21. In any case in which, under the last preceding regulation, or any other rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party

entitled thereto in the same manner as costs ordered to be paid may be recovered.”

Ord. LXV.
r. 27.

“23. Where any party appears upon any application or proceeding in Court or at chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or judge shall expressly direct such costs to be allowed.

Reg. 23.
Unnecessary
appearance in
Court or at
chambers.

“24. The costs of applications to extend the time for taking any proceedings shall be in the discretion of the taxing officer, unless the Court or judge shall have specially directed how the costs are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary, and could not, with due diligence, have been avoided. The costs of a summons to extend time shall not be allowed in cases to which Rule 8 of Order LXIV. applies, unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent, to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application; and in case the taxing officer shall not allow the costs of such summons, and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment, or deal with such costs, in the manner provided by Regulation 21.

Reg. 24.
Costs of
applications
to extend
time.

“25. The taxing officers of the Supreme Court, or of any division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been, or are by general orders directed to be, performed by any of the masters, taxing masters, registrars, or other officers of any of the Courts whose jurisdiction is by the principal Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers

Reg. 25.
Powers of
taxing
officers.

Order LXV.
r. 27.
Reg. 25.

and authorities as previous to the commencement of the principal Act were, or by general orders are, vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a judge.

Reg. 26.
Taxing
master to
assist when
account com-
prises bill of
costs.

“26. Where an account consists in part of any bill of costs, the Court or judge may direct the taxing officer to assist in settling such costs, not being the ordinary costs of passing the account of a receiver, and the taxing officer, on receiving such direction, shall proceed to tax such costs, and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing officer by an order; and he shall return the same, with his opinion thereon, to the Court or judge by whose direction the same were taxed.

Reg. 27.
Attendance of
parties on
taxation.

“27. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

Reg. 28.
Refusal or
neglect to
procure
taxation.

“28. When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

“29. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party.”

Ord. LXV.
r. 27.
Reg. 29.
Costs between
party and
party.

“31. Where the plaintiff is directed to pay to the defendant the costs of the cause, the costs occasioned to a defendant by any amendment of the plaintiff’s pleadings shall be deemed to be part of such defendant’s costs in the cause (except as to any amendment which shall appear to have been rendered necessary by the default of such defendant); but there shall be deducted from such costs any sum which may have been paid by the plaintiff according to the course of the Court at the time of any amendment.

Reg. 31.
Costs of
amendment
of plaintiff’s
pleadings.

“32. Where upon taxation a plaintiff who has obtained a judgment with costs is not allowed the costs of any amendment of his pleadings on the ground of the same having been unnecessary, the defendant’s costs occasioned by such amendment shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

Reg. 32.
Plaintiff re-
fused costs of
his amend-
ments.

“33. Where an action or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order directed to be paid, the taxing officer may tax such costs without any order referring the same for taxation, unless the Court or a judge upon the application of the party alleging himself to be aggrieved prohibits the taxation of such costs.

Reg. 33.
Taxation
where action,
&c., dismissed
with costs.

“34. Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the office of the proper taxing officer, and give notice of his having so done to the other party, and at any time within eight days after such notice such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or before

Reg. 34.
Taxation of
costs where
parties differ.

Ord. LXV.
r. 27.

Reg. 34.

the expiration of the eight days, or such further time as the taxing officer shall in his discretion allow, such other party shall either agree to pay the costs or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs; but where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing officer shall proceed to tax the costs; and where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs.

Reg. 35.

Where total
of costs taxed
to be stated.

“35. Where any costs are by any judgment or order directed to be taxed and to be paid out of any money or fund in Court, the taxing officer in his certificate of taxation shall state the total amount of all such costs as taxed without any direction for that purpose in such judgment or order.

Reg. 36.

Fees of conveyancing
counsel of
the Court,
accountants,
&c.

“36. The allowances in respect of fees to the conveyancing counsel of the Court, and to any accountants, merchants, engineers, actuaries, and other scientific persons to whom any question is referred, shall be regulated by the taxing officers, subject to appeal to the Court or judge, whose decision shall be final.

Reg. 37.

Application
of former
practice.

“37. The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the principal Act, shall, in so far as they are not inconsistent with the principal Act and these rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

Reg. 38.

Considerations by
which taxing
officer's discretion
must
be influenced.

“38. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees

and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances: and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment.

Ord. LXV.
r. 27.
Reg. 38.

“39. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to, and the grounds and reasons for such objections, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

Reg. 39.
Objections to
taxation.
Review.

“40. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

Reg. 40.
Review of
taxation by
taxing officer.

“41. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur, or such other time as the Court or a judge, or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such

Reg. 41.
Review of
taxing
master's
certificate by
judge.

Ord. LXV.
r. 27.
Reg. 41.

order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

Reg. 42.
Evidence on
reviewal.

“42. Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct.”

Reg. 44.
Retaining fee
to counsel.

“44. No retaining fee to counsel shall be allowed on taxation as between party and party.

Reg. 45.
Fees for con-
ferences.

“45. Fees for conferences are not to be allowed in any cause or matter in addition to the solicitor's and counsel's fees for drawing and settling, or perusing any pleadings, affidavits, deeds, or other proceedings or abstracts of title, or for advising thereon, unless it shall appear to the taxing officer for some special reason that a conference was necessary or proper.”

Reg. 47.
Two counsel.

“47. Where the costs of retaining two counsel may properly be allowed, such allowance may be made although both such counsel may have been selected from the outer bar.

Reg. 48.
Refresher
fees.

“48. As to refresher fees, when any cause or matter is to be tried or heard upon *virà voce* evidence in open Court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:—

To the leading counsel . . . from 5 to 10 guineas

To the second, if three counsel . . . 3 to 7 . . .

To the third, if three counsel, or

the second, if only two . . . 3 to 5 . . . (t).

“The like allowances may be made where the evidence in

(t) See *The Courier*, (1891) P. Walker v. *Crystal Palace*, (1891) 2 355; 55 J. P. 793, dissenting from Q. B. 300.

chief is not taken *vivâ voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used.

Ord. LXV.
r. 27.
Reg. 48.

“Provided that in the taxation of costs between solicitor and client the taxing officer shall be at liberty to allow larger fees, under special circumstances to be stated by him.

Solicitor and client.

“49. Where a cause or matter shall not be brought on for trial or hearing, the costs of and consequent on the preparation and delivery of briefs shall not be allowed if the taxing officer shall be of opinion that such costs were prematurely incurred.

Reg. 49.
Premature delivery of briefs.

“50. Where a cause or matter which stands for trial is called on to be tried, but cannot be decided by reason of a want of parties or other defect on part of the plaintiff, and is therefore struck out of the paper, and the same cause is again set down, the defendant shall be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the cause or matter.

Reg. 50.
Defendant's costs, where trial comes on but action cannot be tried.

“51. The following fees are to be allowed to counsel's clerks:—

Reg. 51.
Counsel's clerk's fees.

	£	s.	d.
Upon a fee under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards—per cent.	2	10	0
On consultations, senior's clerk	0	5	0
On consultations, junior's clerk	0	2	6
On conferences	0	5	0
On retainers (where allowed):			
General retainer	0	10	6
Common retainer	0	2	6

“52. No fee to counsel shall be allowed on taxation unless vouched by *his signature* (u).

Reg. 52.
Vouchers for counsel's fees.

(u) Initials are not sufficient.

Ord. LXV.
r. 27.

Reg. 53.
Office copy
affidavit.

Reg. 54.
Office copy
affidavit of
discovery of
documents.

Reg. 55.
Delay before
taxing
master.

Reg. 56.

Delivery of
bill to client,
where costs to
be paid out of
a fund.

Reg. 57.

Power of tax-
ing officer to
limit or
extend time.

"53. In cases in which an original affidavit can be used, and to which Order XXXVIII. rule 15 (x), applies, it shall not be necessary to take an office copy.

"54. It shall not be necessary to take an office copy of an affidavit of discovery of documents, and the copy delivered by the party filing it, may be used as against such party.

"55. Where, in proceedings before the taxing officer, any party is guilty of neglect or delay, or puts any other party to any unnecessary or improper expense relative to such proceedings, the taxing officer may direct such party or his solicitor to pay such costs as he may think proper, or deal with them under regulation 21.

"56. Where in any cause or matter any bill of costs is directed to be taxed for the purpose of being paid or raised out of any fund or property, the taxing officer may, if he shall consider there is a reasonable ground for so doing, require the solicitor to deliver or send to his clients, or any of them, free of charge, a copy of such bill, or any part thereof, previously to such officer completing the taxation thereof, accompanied by any statement such officer may direct, and by a letter informing such client that the bill of costs has been referred to the taxing officer, giving his name and address, for taxation, and will be proceeded with at the time the officer shall have appointed for this purpose, and such officer may suspend the taxation for such time as he may consider reasonable.

"57. The taxing officer shall have power to limit or extend the time for any proceeding before him, and where, by any general order, or any order of the Court or a judge, a time is appointed for any proceeding before or by a taxing officer, unless the Court or judge shall otherwise direct, such officer shall have power from time to time to extend the time appointed upon such terms (if any) as the justice of the case may require, and although the application for the same is not made until after the expiration of the time appointed, it shall not be necessary to make a

certificate or order for this purpose, unless required for any special purpose. Ord. LXV.
r. 27.

“58. Every bill of costs which shall be left for taxation shall be endorsed with the name and address of the solicitor, if any, for whom he is agent, including any solicitor who is entitled or intended to participate in the costs to be so taxed.” Reg. 58.
Endorsement
on bill of
costs.

The following are the Probate Court Rules (Contentious Business) relating to costs which are still in force so far as they are not inconsistent with the rules and orders of the Supreme Court:— Probate
Rules, C. B.

R. 92. “All bills of costs in contentious business are referred to the Registrars of the Principal Registry for taxation, and may be taxed by them without any special order for that purpose. Such bills are (unless by leave of the judge or a registrar) to be filed in the registry two days at least before the day appointed for the taxation. An appointment for taxation will be made at the time of filing the bill” (z). Rule 92, C. B.
Taxing bills
of costs.

R. 93. “The party who has obtained an appointment to tax his bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day’s notice of such appointment, and shall at the same time deliver to him or them a copy of the bill to be taxed.” Rule 93, C. B.

R. 94. “When an appointment has been made by a Registrar of the Principal Registry for taxing any bill of costs, and any of the parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill, after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.” Rule 94, C. B.

R. 95. “If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.” Rule 95, C. B.

(z) Usually sent by post after the bill has been filed.—[D.]

Probate
Rules, C. B.
Rule 128,
C. B.

R. 128. "In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the Registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule *nisi* should have been granted, until the rule is disposed of, unless the judge shall, for cause shown, direct a more speedy taxation."

Rule 129,
C. B.
Review of
Taxation.

R. 129. "Application for a review of taxation is to be made to the judge on summons."

Rule 130,
C. B.
Recovery of
costs.

R. 130. "Upon the Registrar's certificate of costs being signed he shall at once issue an order of the Court for payment of the amount within seven days, unless a summons be taken out for a review of the taxation, in which case the order for payment shall be suspended until the summons is disposed of."

Rule 131,
C. B.

R. 131. "This order shall be served on the proctor, solicitor or attorney of the party liable [or if it is desired to enforce the order by committal on the party himself], and if the costs be not paid within the seven days a writ of *feri facias* or writ of sequestration or a writ of *elegit* shall be issued as of course in the Registry, upon an affidavit of service of the order and non-payment."

Costs in
discretion
of judge.

The question of costs has always been in the discretion of the judge, both in the Prerogative Court and in the Probate Court.

Married
woman
having sepa-
rate estate
condemned in
costs.

Even before the passing of the Married Women's Property Act, 1882, it was held in a probate action that the Court had power to condemn in costs a married woman having general separate estate (z).

As a general rule, an executor who propounds a will in solemn form is entitled to take his costs out of the estate of the deceased.

(z) *Morris v. Freeman*, 3 P. D. 65; 47 L. J., P. D. & A. 79; 39 L. T. 125; 27 W. R. 62.

At the same time, it has been held that an executor taking no interest under the will who, without reasonable grounds, propounds a testamentary paper, is liable to be condemned in costs. Therefore, if he has any doubt as to the validity of a testamentary paper, he should, before propounding it, take security for his costs from the person interested (a).

Nude executor propounding will without cause condemned in costs.

Where an executrix, through her own negligence, had lost the will, and established a draft of it in solemn form of law, she was allowed such costs out of the estate as she would have incurred in proving the original will in solemn form, and she was ordered to pay the costs of the defendants (b).

Executrix losing will.

In decreeing probate of the contents of a destroyed will, the Court condemned in costs a party who had destroyed the will, although she had not entered an appearance (c).

Party destroying will.

In a suit as to the construction of a will in which the heir-at-law is a necessary party, and is made a party by order of the Court, he will be allowed the costs both of proving his heirship, and also of the general suit between the parties, even though he is ultimately unsuccessful (d); and an heir-at-law who intervenes in a suit and opposes the will, though not cited, is entitled to his costs if the will is pronounced against (e).

Costs of heir-at-law.

Where a next of kin unsuccessfully applied for revocation of the probate of a will, he was condemned in costs, although there was strong evidence of the incapacity of the testator, on the ground that he had allowed an unreason-

Party cited condemned in costs.

(a) *Rennie v. Massie*, L. R., 1 P. & D. 118; 35 L. J., P. & M. 124; 14 L. T. 188; 14 W. R. 516; *Roberts v. Cowmeadow*, 21 L. T. 367.

(b) *Burls v. Burls*, L. R., 1 P. & D. 472; 36 L. J., P. & M. 125; 16 L. T. 677; 15 W. R. 1090.

(c) *King v. Gillard*, L. R., 1 P. & D. 539; 37 L. J., P. & M. 4; 17 L. T. 297.

(d) *Singleton v. Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722.

(e) *Rayson v. Parton*, L. R., 2 P. & D. 38; 39 L. J., P. & M. 20; 21 L. T. 647.

Party cited
condemned in
costs.

able time to elapse between the death of the testator and the institution of the suit, and had charged the widow of the testator and the drawer of the will with conspiracy (*f*).

A next of kin who unsuccessfully opposed a will was condemned in the costs of another next of kin whom he had cited to see proceedings, and who had appeared and pleaded, but had taken no further part (*g*).

Next of kin
not cited or
intervened
entering
caveat.

A next of kin, though not cited to see proceedings, and not having intervened, if in fact cognizant of a suit ending in the establishment of a will, is not at liberty to oppose probate of such will; and where a next of kin so situated had entered a caveat, the Court, nevertheless, directed probate to issue and condemned him in costs (*h*).

Executor
condemned in
costs.

Where an attorney propounded, as executor, a will, purporting to be attested by two of his clerks, and on the morning of the trial his counsel stated that he would consent to a verdict for the defendant; the Court, in the absence of a satisfactory explanation of the circumstances, condemned him in the costs of the suit (*i*).

An executor unsuccessfully propounded a will which was opposed by the solicitor for the Duchy of Lancaster, who alleged that the deceased had died intestate, leaving no next of kin, and also by persons claiming to be next of kin. The Crown did not ask for costs; and it ultimately turned out that the other defendants were not next of kin. The Court, notwithstanding, condemned the executor in costs (*k*).

Charge of
incapacity
induced by
statement of
medical man.

A next of kin who unsuccessfully opposed a will on the ground of incapacity was not condemned in costs, where the opposition was induced by a statement of the medical

(*f*) *Clayton v. Davies*, 3 S. & T. 290; 33 L. J., P. & M. 28.

(*g*) *Cross v. Cross*, 3 S. & T. 292; 33 L. J., P. & M. 49; 10 L. T. 70; 12 W. R. 694; 10 Jur., N. S. 180.

(*h*) *Ratcliffe v. Barnes*, 2 S. & T.

486; 31 L. J., P. & M. 61; 6 L. T. 658; 8 Jur., N. S. 313.

(*i*) *Richards v. Humphreys*, 29 L. J., P. & M. 137.

(*k*) *Goss v. Hill*, 40 L. J., P. & M. 39; 25 L. T. 133; 19 W. R. 878.

attendant of the deceased, who had attested the will, and read it over to him (*l*).

Parties who had unsuccessfully opposed probate of a will on the ground of undue influence were condemned in the costs of an intervener, whom they had cited, as well as in the costs of the executors (*m*).

Costs of intervener.

Where it was alleged that a second will revoked a first, an executor who unsuccessfully resisted revocation of a probate of the first will that had been granted him in common form was condemned in costs (*n*).

Two wills; executor resisting revocation of probate condemned in costs.

Where the defendant had obtained probate in common form of a testamentary paper, and such probate was subsequently revoked, the Court, having found that he had been guilty of fraud, condemned him in costs, although he had obtained leave to defend the suit *in formâ pauperis* (*o*).

Pauper condemned in costs.

A widow, as executrix of her deceased husband, propounded his will. Defendants were the sister of the deceased, who appeared but did not plead, and an infant who appeared by her mother, her guardian *ad litem*, and pleaded several matters, among other things questioning the validity of the marriage of the deceased, and alleging undue influence and insanity. At the trial, the Court pronounced against the will with costs, and condemned the defendant, who had appeared and not pleaded, the infant, and her guardian *ad litem*, all in costs (*p*).

Order against infant defendant, against her guardian *ad litem*, and against defendant who had appeared but not pleaded.

(*l*) *Tippett v. Tippett*, 35 L. J., P. & M. 41.

10 L. T. 70.

(*m*) *Tennant v. Cross*, 12 P. D. 4; 56 L. J., P. D. & A. 74; 57 L. T. 372.

(*o*) *Carless v. Thompson*, 1 S. & T. 21.

(*n*) *Cottrell v. Cottrell*, L. R., 2 P. & D. 397; 41 L. J., P. & M. 57; 26 L. T. 527; 20 W. R. 590. And for a case where an unsuccessful next of kin was condemned in costs on the ground of unreasonable delay in taking proceedings, see *In the goods of Hawkins*, 3 S. & T. 290;

(*p*) *Vivian v. Kennelly*, 63 L. T. 778. It seems that, in the Prerogative Court, the guardian of a minor instituting a suit could not be condemned in the costs incurred (after a proxy had been exhibited) on behalf of a party then become of full age; *Green v. Proctor*, 1 Hagg. 337.

Official solicitor guardian *ad litem*.

Where the Court appointed the official solicitor guardian *ad litem* to an infant, because it appeared that the proper guardian would not act, it ordered that such official solicitor's costs should be part of the costs of the plaintiff who was the executor propounding the will (*q*).

Condemnation in costs includes costs of administrator *pendente lite*.

In a testamentary suit, being condemned in costs includes all the charges of an administrator *pendente lite* (*r*). And where a probate action is appealed against, the costs of an administrator *pendente lite* will be allowed from the date of his appointment until the dismissal of the appeal (*s*).

Pleas of undue execution and incapacity.

Where next of kin unsuccessfully oppose a will on the ground of undue execution and incapacity, if there is reasonable ground for their opposition they will not be condemned in costs, even though they call witnesses in support of their plea (*t*).

Of undue influence and fraud.

Will made in favour of widow at her instigation.

The question of undue influence is often a mixed question of the degree of pressure exercised, and the capacity of the testator to resist it. The Court refused to condemn a next of kin in costs who had unsuccessfully opposed a will on the ground of incapacity and undue influence, although there was no direct evidence of undue influence, when it appeared that the will was made in favour of the testator's widow and at her instigation by answer of aye and no, and at a time when his capacity might be fairly questioned (*u*).

Where judge of assize would have been satisfied with verdict either way.

Where the judge of assize was satisfied with a verdict for the plaintiff establishing a will, but would not have been dissatisfied with a contrary verdict, the Court refused to condemn the defendant in costs (*x*).

Where the only question in dispute between the parties

(*q*) *White v. Duvernay*, (1891) P. 290; 60 L. J., P. D. & A. 89.

T. 35; 32 L. J., P. & M. 33; 8 L. T. 172; 11 W. R. 153.

(*r*) *Fisher v. Fisher*, 4 P. D. 231; 48 L. J., P. & M. 69.

(*u*) *Smith v. Smith*, L. R., 1 P. & D. 239; 36 L. J., P. & M. 13; 15 L. T. 192; 15 W. R. 230.

(*s*) *Taylor v. Taylor*, 6 P. D. 29; 50 L. J., P. D. & A. 45; 45 J. P. 457.

(*x*) *Bramley v. Bramley*, 3 S. & T. 430; 33 L. J., P. & M. 111, n.; 12

(*t*) *Summerell v. Clements*, 3 S. &

W. R. 992.

in the suit was, whether the defendant had been lawfully married to the deceased: during the progress of it, applications were made personally to the defendant, and in writing to her attorney, to state where such marriage had taken place: no answer was returned by the attorney, and the information given by the defendant on this point was false: the marriage at the hearing was established, but the Court refused to condemn the plaintiff in the costs of the suit (*y*).

Widow declining to give information as to her marriage with deceased.

Nine years after a testator's death his executors produced and propounded a will: it was opposed by the next of kin: the executors accounted for the delay by saying that the testator had desired that it should not be produced until after his mother's death: the will being admitted to probate, the Court held that as the conduct of the testator in desiring its concealment had given the next of kin a reasonable ground for suspicion, she ought not to be condemned in the costs of her opposition (*z*).

Suspicion arising from testator's own conduct.

Where a widow, twelve months after her husband had died in Canada, took probate of a will in which she was appointed executrix, and a month afterwards she was cited to bring the probate into the Registry by the plaintiff, and obeyed, and the plaintiff then propounded a later will, and after a short time she withdrew from the suit, the Court made no order as to costs (*a*).

No order as to costs. Defendant withdrawing from suit.

Where one of the attesting witnesses to a will proved due execution, but his evidence was contradicted by the other attesting witness, a jury having found that the will was duly executed, the Court decreed probate, but refused to make any order as to costs (*b*).

Attesting witnesses giving opposite evidence as to execution.

An executor of a former will has the same right as a next of kin to put an executor of a subsequent will upon

(*y*) *Wiseman v. Wiseman*, L. R., 1 P. & D. 351; 36 L. J., P. & M. 22; 15 L. T. 415.

(*z*) *Emberley v. Trevanion*, 4 S. & T. 197; 29 L. J., P. & M. 143.

(*a*) *Smith v. Fletcher*, 2 P. D. 20; 21 L. T. 646.

(*b*) *Ferry v. King*, 3 S. & T. 51; 31 L. J., P. & M. 120; 7 L. T. 219.

proof in solemn form and to interrogate his witnesses without being liable to pay costs (*c*).

Compromise
of suit,
solicitor's
costs agreed.

In a suit between the Queen's Proctor and a party claiming to be next of kin, as to the legitimacy of the deceased, a verdict was given in favour of, and administration granted to, such alleged next of kin. Under the impression that he could pay his costs of suit out of the property of the deceased, no application was made by him to the Court at the time of trial in reference to that matter, but, in consequence of proceedings in Chancery, he had been unable to recover such costs. A citation having been served upon him to show cause why the administration should not be revoked, by reason that he was not one of the next of kin of the deceased, he applied to the Court, after the lapse of nine years, to make a formal order that his costs of suit against the Queen's Proctor should be paid out of the deceased's estate. The Court refused to do so after such lapse of time (*d*).

Costs of
Queen's
Proctor.

No order as
to part of the
costs.

The Court of Probate has no authority to condemn the Queen's Proctor in costs of unsuccessful litigation (*e*).

Where, previous to the coming into operation of the Judicature Acts, the plaintiff in a probate suit amended what was termed a special declaration, and the amendment having been made the defendant withdrew from the suit, the Court held that, as the plaintiff in amending his special declaration had relinquished the legal position intended to be maintained by it, the defendant was not liable to pay any costs incurred subsequently to the filing of such declaration (*f*).

Order XXI.
r. 18.

As has been already seen, by Rule 41 of the Probate

(*c*) *Boston v. Fox*, 29 L. J., P. D. & A. 68. See also *Seaton v. Sturch*, 29 L. J., P. D. & A. 195; and *Foale v. Trethewey*, 9 L. T. 87.

(*d*) *Dyke v. Williams*, L. R., 2 P. & D. 239; 40 L. J., P. & M. 33; 24 L. T. 805; 19 W. R. 784.

(*e*) *Atkinson v. Queen's Proctor*, L. R., 2 P. & D. 255; 40 L. J., P. & M. 49; 25 L. T. 164; 19 W. R. 786.

(*f*) *Archer v. Burke*, L. R., 1 P. & D. 558; 37 L. J., P. & M. 30.

Court Rules (Contentious Business), and by Order XXI. r. 18, of the Rules of the Supreme Court (s), the party opposing a will may, under certain circumstances, protect himself from liability as to costs by giving notice that he only insists on the will being proved in solemn form of law, and only intends to cross-examine the witnesses called in support of the will.

Probate Rules, C. B. R. 41, C. B. Notice to cross-examine only ;

But this privilege only extends to such parties as had, under the old practice of the Court, the right to insist upon the will being proved in solemn form. Such parties include a next of kin, or an executor of a former will, who has already obtained probate of such will. Therefore, the privilege does not extend to a residuary legatee under a former will (t).

who may give.

A party who pleads that the deceased did not know and approve of the contents of his will may upon that question cross-examine the witnesses produced by the plaintiff, without being liable to costs, if he has given notice under the rule (u).

Plea of want of knowledge and approval.

But it must be remembered that this rule does not apply where the defendant, by his pleading, throws any part of the burden of proof upon himself.

Rule does not apply where onus on defendant.

Therefore a party pleading undue influence or fraud does not exempt himself from liability for costs by giving notice under the rule (x).

Plea of undue influence or fraud.

The next of kin who vexatiously calls in probate of a will granted in common form may be condemned in costs, although he has given notice under the rule (y).

Next of kin vexatiously calling in probate.

(s) *Ante*, p. 404.

(t) *Hockley v. Wyatt*, 7 P. D. 239; 51 L. J., P. D. & A. 92; 47 L. T. 354; 46 J. P. 792.

(u) *Cleare v. Cleare*, L. R., 1 P. & D. 655; 38 L. J., P. & M. 81; 20 L. T. 499; 17 W. R. 687.

(x) *Harrington v. Bowyer*, L. R., 2 P. & D. 264; 41 L. J., P. & M. 17; 25 L. T. 385; 19 W. R. 982;

Farlar v. Farlar, 1 S. & T. 124.

See also *Ireland v. Rendall*, L. R., 1 P. & D. 194; 35 L. J., P. & M. 79; 14 L. T. 574.

(y) *Beale v. Beale*, L. R., 3 P. & D. 179; 43 L. J., P. & M. 70; 30 L. T. 770; 22 W. R. 712. See also *Sheffield v. Sheffield*, 43 L. J., P. & M. 72; 31 L. T. 455.

q2 p.
See *Deigh v. Gre*
C.A. 92. p. 17.
Power to Condemn
in Costs person
who has given
notice, only app
to Cases of Ca
in aforesaid.

Notice of intention to cross-examine only.

Notice requiring presence of both attesting witnesses.

Must be given with defence.

Costs out of the estate.

Party entitled in distribution.

Rule 41 (Contentious Business) is binding on a County Court judge when trying a probate action (z).

In a testamentary suit, the defendants with their defence gave notice that they merely insisted upon the will being proved in solemn form of law by the production of the attesting witnesses, and that if both such witnesses were produced, they only intended to cross-examine the witnesses produced in support of the will:—Held, that under Rule 41 sufficient notice had been given, and that the defendants were not liable to be condemned in costs (a).

The notice, under Rule 41, must be given with the defence; if served afterwards, it has been held not to be in compliance with the terms of the rule, and that the party could not claim under it any exemption as to costs (b).

The Court allowed costs out of the estate to the unsuccessful opponent of a will, although he had pleaded undue influence and fraud, being of the opinion that the mode in which the testator had executed the will, and the conduct of the persons beneficially interested under it, had reasonably excited doubt and suspicion, and justified those pleas (c).

A person entitled in distribution, who merely puts the executors to strict proof of a will in solemn form, if he has reasonable ground for doing so, will generally be allowed his costs out of the estate. But not if it appears that his

(z) *Leigh v. Green*, (1892) P. 17; 61 L. J., P. D. & A., and it would seem to follow that all the old Probate Court Rules are therefore binding on a County Court judge trying a probate action.

(a) *Leeman v. George*, L. R., 1 P. & D. 542; 37 L. J., P. & M. 13; 17 L. T. 518.

(b) *Bone v. Whittle*, L. R., 1 P. & D. 249; 36 L. J., P. & M. 15; 15 L. T. 330.

(c) *Orton v. Smith*, L. R., 3 P. & D. 23; 42 L. J., P. & M. 23; 28 L. T. 112. See also *Cousins v. Tubb*, L. J., N. of C., (1891) 148; *Davies v. Gregory*, L. R., 3 P. & D. 28; 42 L. J., P. & M. 33; 28 L. T. 239; 21 W. R. 462; *Jenner v. Finch*, 5 P. D. 106; 49 L. J., P. D. & A. 25; 42 L. T. 327; 28 W. R. 520; *West v. Goodrick*, 31 L. J., P. & M. 39.

object in calling for such proof was not simply to obtain the judgment of the Court of Probate as to the validity of the will, but to elicit evidence which might be used by him in a suit instituted in another Court (*d*).

Notice of intention to cross-examine only.

A legatee who has propounded a codicil and succeeded is entitled to the same costs as an executor under similar circumstances.

Legatee proving will instead of executor entitled to costs.

Thus, where the plaintiffs, who were legatees, propounded a codicil, the defendant (who was the executor) having proved the will only, the Court, having pronounced for the will, condemned the defendant in costs, and gave the plaintiffs also, out of the estate, such sum, *nomine expensarum*, as would cover the additional expenses (*e*).

The principle on which costs are given out of the estate is, that the party was led into the suit by the state of the testamentary papers (*f*).

Costs out of the estate.

Thus, when litigation is rendered necessary by the state in which the deceased left his papers, the costs of it, though unsuccessful, will be allowed out of the estate (*g*).

Rendered necessary by state in which paper left by deceased.

Where issues of undue execution, incapacity, and undue influence, raised by the next of kin in opposition to a will were found against him, the Court, however, refused to condemn him in costs, because it was of opinion that the parties propounding the will, and in whose favour it was made, had acted so as to excite the suspicion of the next of kin, but refused to allow his costs out of the estate, because he had not sufficient grounds for the pleas he had filed (*h*).

Undue influence pleaded.

When a next of kin, who resisted probate on the ground of undue execution, proceeded to trial, despite of notice by

Next of kin insisting on proof.

(*d*) *Swinfen v. Swinfen*, 1 S. & T. 283; 29 L. J., P. & M. 153.

(*e*) *Wilkinson v. Corfield*, 6 P. D. 27; 50 L. J., P. D. & A. 44; 29 W. R. 613; 45 J. P. 440; *Sutton v. Drax*, 2 Phill. 323, followed as to costs; *Bremer v. Freeman*, Dea. & Sw. 258, as to sum “*nomine*

expensarum.”

(*f*) *Hillam v. Walker*, 1 Hagg. 74.

(*g*) *Thorncraft v. Lashmar*, 2 S. & T. 484; 31 L. J., P. & M. 150; 6 L. T. 476; 8 Jur., N. S. 595.

(*h*) *Broadbent v. Hughes*, 29 L. J., P. & M. 134.

Costs out of the estate.

the executor that it was not intended to support the will, the Court refused to allow him costs out of the estate, other than such as the Registrar, having regard to the duty cast upon him, might think reasonable (*i*).

Executor acting in interest of infants.

Where an executor propounded a will in the interest of infant children, and did not become aware, until after the suit was instituted, that it had not been duly executed, the Court held that he was entitled to his costs out of the estate (*k*).

Legatee acting in interest of infant.

Where a legatee acting in the interest of an infant residuary legatee succeeded in establishing a will under which she herself took only a trifling legacy, the executor having refused to propound the will, the Court ordered her costs to be paid out of the estate (*l*).

Litigation arising through fault of testator.

Whether the cause of litigation takes its origin in the fault of the testator, or of those interested in the residue, in either case the costs may properly be paid out of the estate (*m*).

The costs will also be allowed out of the estate, on the ground that a question of law raised by the party opposing was so doubtful that he was entitled to have it decided by a competent tribunal (*n*). If there be sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent (*o*).

(*i*) *Fritchley v. Fritchley*, 16 L. T. 267.

(*k*) *Davies v. Rees*, 13 L. T. 609.

(*l*) *Bewsher v. Williams*, 3 S. & T. 62; 11 W. R. 541 (*n*).

(*m*) *Mitchell v. Gard*, 3 S. & T. 275; 33 L. J., P. & M. 7; 9 L. T. 491; 10 Jur., N. S. 51; 12 W. R. 255. In the recent case of *Cousins v. Tubb* (*ante*, p. 542), the Court gave costs to a defendant who had

failed to establish a plea of undue influence, on the ground that the conduct of the deceased had led to a *bonâ fide* belief that his will had been obtained by undue influence.

(*n*) *Robins v. Dolphin*, 1 S. & T. 518; 29 L. J., P. & M. 138; 8 W. R. 177.

(*o*) *Mitchell v. Gard*, *ante*, note (*m*). See also Wms. on Exors., 9th ed. 311, and following pages.

Where the Court gives the next of kin, who unsuccessfully opposes a suit, their costs out of the estate, on the ground that the litigation was caused by the act of the testator, it will also give the heir-at-law, who has been cited to see proceedings, his costs out of the estate, if he has not by his conduct put the estate to unnecessary expense (*p*).

Costs out of the estate.

Heir-at-law.

In the Ecclesiastical Courts a party successfully propounding a will, thus discharging the duty of the executor, was entitled to costs out of the estate (*q*). And this was so even where he propounded merely a codicil which the executor had refused to propound (*r*).

In Ecclesiastical Courts.

Where a testatrix directed by her will that all her just debts, funeral and testamentary expenses should be paid out of her real and personal estate, and she died possessed of no personal estate, and the litigation in relation to her will was caused by its concealment by her direction from the opposing party who failed, the Court gave the unsuccessful party costs out of the estate, and ordered them to be paid rateably out of the realty (*s*).

No personal estate, costs out of realty.

A person was of eccentric habits, but had always managed his own affairs. His executors propounded his will, but failed to support it, the evidence showing that at the time it was executed he was not of sound mind. The Court being of opinion that they had acted in the *bonâ fide* belief of his capacity, and that they could have had no knowledge of his true life and character until it was disclosed on the trial, allowed their costs out of the estate (*t*).

Will set aside on ground of insanity, costs out of estate nevertheless.

Where a will was established all but the residuary clause, which was found to have been obtained by the undue in-

Will established all but residuary clause.

(*p*) *Smyth v. Wilson*, 36 L. J., P. & M. 82; 15 L. T. 446.

(*q*) *Sutton v. Drax*, 2 Phill. 323; *Williams v. Gouds*, 1 Hagg. 577.

(*r*) *Thorne v. Rooke*, 2 Curt. 799.

(*s*) *Smith v. Hopkinson*, 4 P. D. 84; 47 L. J., P. & M. 40; 39 L. T. 124; 26 W. R. 884.

(*t*) *Boughton v. Knight*, L. R., 3 P. & D. 64; 42 L. J., P. & M. 41; 28 L. T. 562.

Costs out of the estate.

fluence of the executrix the Court condemned her in the costs of the suit, excepting those of proving the will in solemn form, which were allowed out of the estate (*u*).

The following are some of the older cases relating to costs out of the estate :—

Next of kin putting executors to unnecessary expense.

Where a will was made under remarkable circumstances, and such as would have justified the next of kin in calling upon the executors to prove it in solemn form, the next of kin, having put the executors to a very expensive trial, although she had previously received from them full and complete information respecting its execution, was held not entitled to have her costs out of the estate: the Court declined to make any order as to costs (*x*).

Executors admitting portion of codicil.

A., B., and C., three legatees named in a codicil, sought probate of it in solemn form against the executors named in the will; subsequently to their having propounded the codicil, D., another legatee, intervened: the executors by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D.:—Held, that D. was not entitled to have his costs out of the estate (*y*).

Question of domicile raised as well as question of law.

The plaintiffs propounded a will made in Mysore: the defendant, the next of kin, pleaded that the testator, when he made his will, was a domiciled Scotchman, and that the will was not executed in conformity with the laws of Scotland: the plaintiffs replied, first, that the testator was not domiciled in Scotland but in Mysore, and that the will was executed in conformity with the laws of Mysore; secondly, that the will was executed so as to be valid according to the law of Scotland, if the testator was a domiciled Scotchman. Issue was joined, but before the cause came on for trial, a Scotch Court of Appeal, for the first time, decided that the will of a domiciled Scotchman affecting personalty, made in a foreign country and in

(*u*) *Smith v. Atkins*, L. R., 2 239.
P. & D. 169.

(*y*) *Shawe v. Marshall*, 1 S. & T.

(*x*) *Nicholls v. Binns*, 1 S. & T. 129.

accordance with its laws, is valid in Scotland: the defendant, as soon as he became cognisant of this decision, gave notice that he should not further contest the will, and at the hearing offered no opposition:—Held, that though the defendant, if he had raised simply the question of law, might have been entitled to costs out of the estate, yet that, as he had raised also the question of domicile, and without reason, he was not entitled to such costs (*z*).

Costs out of the estate.

The omission to annex to, or to mention in the affidavit of scripts, the instructions for a will, is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions (*a*).

Omission to mention instructions for will in affidavit of scripts.

Where the widow of a deceased propounded a will by which she was appointed sole executrix and universal legatee: one of the next of kin opposed, on the ground (*inter alia*) of incapacity, and upon that issue the Court pronounced against the will, but, under the special circumstances of the case, declined to condemn the widow in costs; and it was held the next of kin, though not entitled to administration, was entitled to his costs out of the estate (*b*).

Will set aside on ground of incapacity. Special circumstances.

Where a next of kin defendant successfully opposed, on the ground of undue influence exercised by the executors and by the residuary legatee, a will propounded by the executor, the Court condemned the executor plaintiff in costs: the plaintiff was also executor under an earlier will, which appointed the same residuary legatee, under which the executor took nothing, and the Court refused to make an order securing out of the estate to the defendant

Executor condemned in costs—further order to secure costs out of estate refused.

- (*z*) *Onslow v. Cannon*, 2 S. & T. 11 W. R. 32.
 136; 30 L. J., P. & M. 165; 4 L. T. 217.
 (*b*) *Critchell v. Critchell*, 3 S. & T. 41; 32 L. J., P. & M. 108; 8 L. T. 173; 11 W. R. 401.
 (*a*) *Foxwell v. Poole*, 3 S. & T. 5; 32 L. J., P. & M. 8; 7 L. T. 757;

Costs out of the estate.

such costs as he might not be able to recover from the plaintiff (*c*).

An order on a person as administrator to pay costs is equivalent to an order to pay out of the deceased's estate; and if the assets have been properly exhausted, no attachment will be granted for disobedience to such order (*d*).

Reasonable ground for disputing will.

The unsuccessful opponent of a will will not be condemned in costs if there was reasonable ground for his disputing the will, but he will not be entitled to his costs out of the estate unless the litigation was justified by the act of the testator, or by the misconduct of the person out of whose pocket such costs would come if paid out of the estate (*e*).

Unreasonable delay in producing will.

A next of kin, after making inquiries for a will and waiting five months to see whether a will was forthcoming, took out administration: the person of whom he made inquiries then produced a will, and propounded it as a legatee, and the administrator put him upon proof in solemn form: the Court revoked the administration and pronounced for the will, but allowed the next of kin's costs of obtaining administration and of the suit out of the estate, no explanation being given of the delay in producing the will (*f*).

Costs incurred by creditor.

Costs incurred by a creditor in obtaining the appointment of an administrator *pendente lite* were allowed out of the estate (*g*).

Costs of special jury.

An application for the certificate of the costs of a special jury ought to be made immediately after the verdict has been given (*h*).

(*c*) *Nash v. Yelloly*, 3 S. & T. 59; 8 L. T. 290; 11 W. R. 541.

(*d*) *In the goods of Williams*, 3 S. & T. 437; 33 L. J., P. & M. 127; 10 L. T. 583.

(*e*) *Williams v. Henry*, 3 S. & T. 471; 33 L. J., P. & M. 110; 12 W. R. 1015.

(*f*) *Smith v. Smith*, 4 S. & T. 3;

34 L. J., P. & M. 57; 11 Jur., N. S. 143; 13 W. R. 504.

(*g*) *Tichborne v. Tichborne*, L. R., 1 P. & D. 730; 38 L. J., P. & M. 55; 20 L. T. 820, 1015; 17 W. R. 832.

(*h*) *Skipper v. Bodkin*, 2 S. & T. 1; 29 L. J., P. & M. 133 (nom.

Skipper v. Skipper).

Before the institution of the Court of Probate, the Court in all cases could, upon application made to it, direct security for costs to be given by either or all of the parties. But the Court of Probate was not in the habit of ordering security for costs to be given, except where a Court of common law would have done so (*i*).

Security for costs.

The Probate Division will not order a plaintiff to find security for costs when, though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving this country (*k*).

Foreigner staying in England.

Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), married women suing as plaintiffs, without their husbands being joined, are not liable to give security for costs (*l*).

M. W. P. Act, 1882.

Married women not liable to give security for costs.

An order was made for the revocation of a grant of administration with the will annexed. The letters of administration were in the hands of the proctors who had obtained them, and who claimed a lien upon them for costs. The Court declined to order the proctors to deliver up the letters for the purpose of cancellation, but directed that a copy of its order, revoking the grant and requiring the executor to bring the letters into the Registry if they ever came into his possession, should be served upon them (*m*).

Solicitor's lien for costs.

Where a probate action has been compromised, and the solicitor's costs agreed at a fixed sum, the Court held that his bill of costs was not liable to taxation (*n*).

Action compromised, solicitor's costs agreed at fixed sum.

(*i*) *Robson v. Robson*, 3 S. & T. 568; 34 L. J., P. & M. 6; 11 L. T. 459; 10 Jur., N. S. 1843.

(*k*) *Crispin v. Doglioni*, 1 S. & T. 522; 29 L. J., P. & M. 130; 6 Jur., N. S. 303.

When a party is out of the kingdom the Court will direct him to give security for costs. *Hillam v. Walker*, 1 Hagg. 72.

for a decree calling on the executor to prove it in solemn form in 1853, the motion was granted on security being given for the costs. *In the goods of Topping*, 2 Robert. 620.

(*l*) *Threlfall v. Wilson*, 8 P. D. 18.

(*m*) *Barnes v. Durham*, L. R., 1 P. & D. 728; 38 L. J., P. & M. 46.

(*n*) *Holditch v. Carter*, L. R., 3 P. & D. 115; 29 L. T. 249; 21 W. R. 934.

But where probate was granted in 1835, and a motion was made

- Taxation.** In taxing the costs of a trial in a testamentary suit, the Registrar may exercise his discretion as to the number of counsel (*o*) and witnesses whose fees and expenses should be allowed (*p*).
- Issues found distributively.** When issues are found distributively, the party condemned in costs is not liable for costs of issues found in his favour if separable from the other costs (*q*).
- Costs of unsuccessful party out of estate.** When the costs of an unsuccessful party to a testamentary suit are directed to be paid out of the estate, they are not taxed on so liberal a scale as between solicitor and client (*r*).
- County Court trial.** Where the issues raised in a suit in the Court of Probate have been directed to be tried by the judge of a County Court, the judge of the Court of Probate will decide any questions as to the costs of those issues, and the costs of those issues will be taxed in the principal registry (*s*).
- No estate out of which to pay costs.** A wife having a power of appointment over certain funds executed same by will in favour of her husband. The funds were handed over to the husband in the lifetime of his wife, and by him transferred to the trustees of a settlement made on the marriage of his adopted daughter. The husband survived his wife, but did not prove her will, and died possessed of property of only nominal value. In an action arising out of her will, the costs of the next of kin were ordered to be paid out of her estate. The Court held there was no estate out of which such costs could be paid (*t*).
- Staying proceedings.** Where the plaintiff in a probate action was liable to the defendant for some costs incurred in proceedings in

(*o*) *Braine v. Braine*, 1 S. & T. 271; 29 L. J., P. & M. 151.

(*p*) *Edwards v. Payne*, 1 S. & T. 276; 29 L. J., P. & M. 145.

(*q*) *Rayson v. Parton*, L. R., 2 P. & D. 38; 39 L. J., P. & M. 20; 21 L. T. 647. See also *Fyson v. Westrope*, 1 S. & T. 279; 29 L. J., P. & M. 139; 5 Jur., N. S. 250; *Du*

Boison v. Maxwell, 28 L. T. 369; 21 W. R. 575.

(*r*) *Jeffery v. Jeffery*, 28 L. J., P. & M. 43.

(*s*) *Thomas v. Crowther*, 2 S. & T. 501; 10 W. R. 861.

(*t*) *Adamson v. Hammond*, L. R., 3 P. & D. 141; 43 L. J., P. & M. 17; 29 L. T. 700.

Chancery, the Court refused to stay proceedings in the probate action until such costs had been paid (*u*). Staying proceedings.

The next of kin of a testator instituted a suit for administration with a will annexed, dated 1868, of which the sole executor and universal legatee was the testator's wife, who predeceased him. In opposition, parties claiming to be legatees set up the contents of a will, some two years later, but which could not be found. The Court of Appeal, reversing the judgment of the Probate Division, decided that there was not sufficient evidence of the contents of the second will, and their decision was affirmed in the House of Lords. A fresh suit for probate of the second will was then begun by the executor of the testator and residuary legatee of that will, founded upon fresh evidence of its contents and execution:—Held, that though the plaintiff had been privy to the prior action, an application to stay proceedings generally could not be granted, but only until the plaintiff's costs in the prior action had been paid (*x*). Application for.
Costs of prior action ordered to be first paid.

A defendant in a suit having been condemned in costs, and having neglected to pay them, and having no personal property, but having real property, the Court held that it had power to issue a writ of *elegit* (*y*). Writ of *elegit*.

A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property, which was in the hands of parties holding under the person whose estate had been sequestered, and was refused possession. The Court declined to enforce the sequestration by an attachment against those parties, but granted a writ of assistance to the sheriff for that purpose (*z*). Writ of sequestration.

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| <p>(<i>u</i>) <i>Hankin v. Turner</i>, 48 L. J.,
P. & M. 38; 40 L. T. 335; 27 W.
R. 232.</p> <p>(<i>x</i>) <i>Peters v. Tilly</i>, 11 P. D.
145; 55 L. J., P. D. & A. 75;</p> | <p>35 W. R. 183.</p> <p>(<i>y</i>) <i>Heath v. Heath</i>, 29 L. T. 931;
22 W. R. 266.</p> <p>(<i>z</i>) <i>Bayley v. Bayley</i>, 4 S. & T.
222.</p> |
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APPENDIX.

WILLS ACT, 1837.

(1 VICT. c. 26.)

An Act for the Amendment of the Laws with respect to Wills. 1 Vict. c. 26.
[3rd July, 1837.]

BE it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures *in capite* and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries and Tenures *in capite* and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular Number;

Meaning of
certain words
in this act.

"Will;"

12 Car. 2,
c. 24.

14 & 15
Car. 2 (I.).

"Real
estate;"

"Personal
estate;"

Number;

- 1 Vict. c. 26. number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.
- Gender.
- Repeal of the Statutes of Wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.
2. And be it further enacted, that an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate, being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice" as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an act made in the Twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie*; and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his majesty's colonies and plantations in America; and also an
- 10 Car. 1, sess. 2, c. 2 (I.).
- Sects. 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12 (I.).
- Sect. 14 of 4 & 5 Anne, c. 16.
- 6 Anne, c. 10 (I.).
- Sect. 9 of 14 G. 2, c. 20.
- 25 G. 2, c. 6 (except as to colonies).

act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third intituled, "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which this act does not extend.

1 Vict. c. 26.

25 G. 2, c. 11 (L.).

55 G. 3, c. 192.

3. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estates, as

All property may be disposed of by will,

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie*;

contingent interests;

rights of entry;

and property

1 Vict. c. 26. the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

As to the fees and fines payable by devisees of customary and copyhold estates.

4. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

5. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will;

and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

6. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

7. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

9. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

10. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

1 Vict. c. 26.
and the lord to be entitled to the same fine, &c. when such estates are not now devisable as he would have been from the heir in case of descent.

Estates pur autre vie.

No will of a person under age valid; nor of a feme covert, except such as might now be made.

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time (a).

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

(a) Amended by 15 Vict. c. 24, *infra*.

1 Vict. c. 26.
Soldiers and
mariners' wills
excepted.

Act not to
affect certain
provisions of
11 G. 4 &
1 W. 4, c. 20,
with respect to
wills of petty
officers and
seamen and
marines.

Publication
not to be
requisite.

Will not to be
void on ac-
count of in-
competency
of attesting
witness.

Gifts to an
attesting
witness to
be void (a).

Creditor
attesting to
be admitted
a witness.

Executor to
be admitted
a witness (a).

11. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.

12. And be it further enacted, that this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King George the Fourth and the first year of the reign of his late majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect of services in her majesty's navy.

13. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

14. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

15. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

16. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

17. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to

(a) As to wills made before 1838 in these respects, see 25 Geo. II. c. 6, *supra*.

be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. 1 Vict. c. 25.

18. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

Will to be revoked by marriage.

19. And be it further enacted, that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances.

No will to be revoked by presumption.

20. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

21. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

No alteration in a will shall have any effect unless executed as a will.

22. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

23. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as

A devise not to be rendered inoperative by any subsequent conveyance or act.

1 Vict. c. 26. aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A will shall be construed to speak from the death of the testator. **24.** And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A residuary devise shall include estates comprised in lapsed and void devises. **25.** And be it further enacted, that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands. **26.** And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general gift shall include estates over which the testator has a general power of appointment. **27.** And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A devise without any words of limitation shall be construed to pass the fee simple. **28.** And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple,

or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will. 1 Vict. c. 26. construed to pass the fee.

29. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

30. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

31. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied. Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

32. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened im- Devises of estates tail shall not lapse.

1 Vict. c. 26.

mediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

34. And be it further enacted, that this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Act not to extend to Scotland.

35. And be it further enacted, that this act shall not extend to Scotland.

Act may be altered in this session.

36. And be it enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

15 VICT. c. 24 (LOCKE KING'S ACT).

15 Vict. c. 24. *An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled, "An Act for the Amendment of the Laws with respect to Wills."* [17th June, 1852.]

WHEREAS the laws with respect to the execution of wills require further amendment: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same (as follows):

1 Vict. c. 26.

1. Where by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no

will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

3. The word "will" shall in the construction of this act be interpreted in like manner as the same is directed to be

15 Vict. c. 24.
When signature to a will shall be deemed valid.

Act to extend to certain wills already made.

Interpretation of "will."

- 15 Vict. c. 24. interpreted under the provisions in this behalf contained in the said act of the first year of the reign of her Majesty Queen Victoria.
- Short title of act. 4. This act may be cited as "The Wills Act Amendment Act, 1852."
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20 & 21 VICT. c. 77 (COURT OF PROBATE ACT, 1857).

C. P. A. 1857. *An Act to amend the Law relating to Probates and Letters of Administration in England.* [25th August, 1857.]

WHEREAS it is expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration in England should be exercised in the name of her Majesty, by one court: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Commence-
ment of act.

1. This act (except where otherwise specially provided) shall come into operation on such day, not sooner than the first day of January, one thousand eight hundred and fifty-eight, as her Majesty shall by order in council appoint, provided that such order shall be made one month at least previously to the day so to be appointed.

Interpreta-
tion of terms.

2. In the construction of this act, unless the context be inconsistent with the meaning hereby assigned—

"Will" shall comprehend "testament" and all other testamentary instruments of which probate may now be granted:

"Administration" shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special or limited purposes:

"Matters and causes testamentary" shall comprehend all matters and causes relating to the grant and revocation of probate of wills or of administration:

"Common form business" shall mean the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the court of probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

3. The voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other courts and persons in England now having jurisdiction or authority to grant or revoke probate of wills, or letters of administration, of the effects of deceased persons, shall, in respect of such matters, absolutely cease; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such court or person.

C. P. A. 1857.
Testamentary jurisdiction of ecclesiastical and other courts abolished.

4. The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons now vested in or which can be exercised by any court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall, except as hereinafter is mentioned, be exercised in the name of her Majesty in a court to be called the court of probate, and to hold its ordinary sittings and to have its principal registry at such place or places in London or Middlesex as her Majesty in council shall from time to time appoint.

Testamentary jurisdiction to be exercised by a court of probate (a).

5. There shall be one judge of her Majesty's court of probate; and it shall be lawful for her Majesty, from time to time, by letters patent under the great seal of the United Kingdom, to appoint a person, being or having been an advocate of ten years' standing, or a barrister-at-law of fifteen years' standing, to be such judge.

Power to her Majesty to appoint a judge of the court of probate (b).

6. The judge of the court of probate shall hold his office during good behaviour, provided that it shall be lawful for her Majesty to remove any such judge from his office upon an address of both houses of parliament.

Judge's tenure of office.

7. Every judge of the court of probate shall, before executing any of the duties of his office, take the following oath, which the lord chancellor, or the master of the rolls for the time being, is hereby respectively authorized and required to administer:

Judge before acting to take the following oath.

"I, A. B., do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power, execute the office of judge of the court of probate.

"So help me God."

8. The judge shall have rank and precedence with the puisne judges of her Majesty's superior courts of common law at Westminster, according to the date of his appointment,

Rank and precedence of judge, who shall appoint a secretary and usher.

(a) C. P. A. 1858, s. 10, "County Court Jurisdiction."

(b) C. P. A. 1858, s. 1.

C. P. A. 1857. and he shall have a secretary and usher, to be from time to time appointed and removed by him at his pleasure.

Salaries of judge, secretary and usher. 9. There shall be paid to the judge the net yearly salary of four thousand pounds, and to his secretary the net yearly salary of three hundred pounds, and to his usher the net yearly salary of one hundred and fifty pounds.

Judge of court of probate to be also judge of the admiralty court on the next vacancy. 10. Upon the next vacancy in the office of judge of the high court of admiralty of England, it shall be lawful for her Majesty, if she so think fit, to appoint the person then being judge of the court of probate, to be also judge of the said court of admiralty, or in case the office of judge of the court of probate become vacant before the office of judge of the court of admiralty, the judge of the court of admiralty may, with his consent, be appointed to and hold also the office of judge of the court of probate, and after the union of the said two offices they shall be thenceforth held by the same person.

As to increase of salary upon union of the two offices. 11. From and after the union under this act of the two offices of judge of the court of probate and judge of the court of admiralty in the same person, the said yearly salary of four thousand pounds payable under this act shall be increased to five thousand pounds, and the salary now payable to the judge of the court of admiralty shall cease.

Retiring pensions of judges. 12. Her Majesty, by letters patent under the great seal of the United Kingdom, may grant unto any person executing the office of judge of her Majesty's court of probate an annuity, not exceeding two thousand pounds, or if such person be also executing the office of judge of the said court of admiralty, not exceeding three thousand five hundred pounds, to commence immediately after the day when the person to whom such annuity shall be granted shall resign the said office or offices, and to continue during his natural life; provided that her Majesty may, in and by such letters patent limit the duration of payment of such annuity, or any part thereof, to such periods of time during the natural life of such person in which he shall not exercise any office of profit under her Majesty, so that such annuity, together with the salary and profits of such other office, shall together not exceed in the whole the said sum of two thousand pounds, or three thousand five hundred pounds, as the case may be: provided also, that no annuity granted to any person having executed the office of judge under this act, except the present judge of the prerogative court, shall be valid, unless such person shall have held such office for the period of fifteen years, or have held such office and any of the offices of judge in any of the superior courts of law or equity, or the high court of admiralty, for periods amounting together to fifteen years, or shall be afflicted with some permanent infirmity disabling him

from the due execution of his office, which shall be distinctly recited in the said grant. C. P. A. 1857.

13. There shall be established for each of the districts specified in schedule (A.) to this act, and at the places respectively mentioned in such schedule, a public registry attached to and under the control of the court of probate, hereinafter referred to as "the district registry." District registries to be established as in schedule (A).

14. There shall be three registrars, two record keepers, and one sealer for the principal registry of the court of probate, and there shall be one district registrar for each district registry hereinafter referred to as the district registrar, and there shall be so many clerks and other officers for the court and the principal registry as the judge of the court, with the sanction of the commissioners of her Majesty's treasury, may from time to time think fit: provided, that if at any time it appear to her Majesty in council that the duties of the registrars of the principal registry of the court of probate can be performed by two registrars, it shall be lawful for her Majesty by order in council to direct that the number of registrars for such principal registry be reduced accordingly. Appointment of officers of the court of probate (a).

15. Charles Dyneley, esquire, John Iggulden, esquire, and William F. Gostling, esquire, the present deputy registrars of the prerogative court of Canterbury, shall, if willing to accept the office, be the first registrars of the principal registry of the court of probate; Joseph Todd and John Smith, the present record keepers of the said prerogative court, shall, if willing to accept the office, be the first record keepers at the said principal registry; and William John Berry, the present sealer of the said prerogative court, shall, if willing to accept the office, be the first sealer at the said principal registry; and George Jarvis Foster, clerk of the papers in the said prerogative court, shall, if willing to accept the office, be the first clerk of papers at the said principal registry. As to appointment of the first officers of the principal registry.

16. The other clerks and officers now employed in the said prerogative court shall be transferred to such situations in the court of probate and the principal registry thereof as the lord chancellor may in that behalf direct, so that their duties may be such as in the opinion of the said lord chancellor may be as nearly as possible similar to those which they have heretofore discharged in the said prerogative court: provided always, that no such clerk or other officer shall be so transferred whom the said lord chancellor shall consider to be from age, infirmity, or other cause incompetent to the discharge of his duties. Clerks and officers of prerogative court to be transferred to like offices in court of probate.

17. The registrar or deputy registrar (as the case may Existing diocesan reg's-

(a) C. P. A. 1858, s. 6.

- C. P. A. 1857. be) now executing in person the duties of registrar of a diocesan or other court exercising testamentary jurisdiction at any place at which a district registry is to be established under this act, or where there is more than one such registrar or deputy registrar so acting, such one of them as the judge shall select shall be appointed the first district registrar for such district, save where the judge shall consider such registrar or deputy registrar, or all such registrars or deputy registrars if more than one, to be from age, infirmity, or other cause incompetent to the discharge of the duties of district registrar; provided that where there is now more than one such registrar or deputy registrar competent to the discharge of the duties, the judge may appoint them or more than one of them to hold such office of district registrar jointly with benefit of survivorship.
- As to appointment to offices. Salaries of officers. 18. The registrars, district registrars, and other officers of the court of probate, except as herein provided, shall be appointed by the judge: there shall be paid to the several officers mentioned in schedule (B.) to this act the several salaries set opposite to their respective titles in the same schedule, and the said district registrars shall, for the performance of their duties under this act, including the services of any clerks they may employ, be entitled to take in respect of the business in their respective district registries such fees as shall be fixed as hereinafter provided; and, except as aforesaid, there shall be paid to the several clerks and other officers appointed under this act such salaries or other remuneration as the Judge, with the consent of the commissioners of her Majesty's treasury, shall from time to time in each case direct.
- Tenure of office of officers. 19. The registrars and district registrars shall hold their offices during good behaviour, subject to be removed by order of the lord chancellor for some reasonable cause to be in such order expressed, and the other officers of the court may be removed by the judge, with the sanction of the lord chancellor.
- Qualification of registrars and district registrars. 20. No person shall be appointed a registrar or district registrar who shall not be or have been an advocate, barrister-at-law, proctor, solicitor or attorney-at-law, unless at the time of the passing of this act he is performing in person the duties of registrar or deputy registrar of some ecclesiastical court in England, or is acting as articled clerk or paid clerk to a proctor in Doctors' Commons, or as officer or clerk in the office of the said prerogative court, or of the prerogative court of York, or of any diocesan court.
- Officers of the court to execute their offices in person. 21. All registrars, district registrars, officers, and clerks of the court of probate shall execute their respective offices in person and not by deputy; and no registrar of the

principal registry of the court, nor any officer or clerk in the principal registry thereof, shall during the time of his holding such office directly or indirectly practise as an advocate, barrister, proctor, solicitor, or attorney, or receive or participate in the fees of any other person so practising.

C. P. A. 1857.

Registrars, &c. not to act as proctors, &c.

22. The judge shall cause to be made seals for the court of probate, that is to say, one seal to be used in its principal registry and separate seals to be used in the several district registries, and may cause the same respectively from time to time to be broken, altered, and renewed at his discretion; and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the court of probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

Power to judge to cause seals of the court to be provided.

23. The court of probate shall be a court of record, and such court shall have the same powers, and its grants and orders shall have the same effect, throughout all England, and in relation to the personal estate in all parts of England, of deceased persons, as the prerogative court of the archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary and those effects of deceased persons which are within the jurisdiction of the said prerogative court; and all duties which, by statute or otherwise, are imposed on or should be performed by ordinaries generally, or on or by the said prerogative court, in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions, shall be performed by the court of probate: provided that no suits for legacies, or suits for the distribution of residues, shall be entertained by the court, or by any court or person whose jurisdiction as to matters and causes testamentary is hereby abolished.

The court to have throughout all England the same powers as the prerogative court within the province of Canterbury.

24. The court of probate may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to be examined in any suit or other proceeding in respect of matters or causes testamentary, and may examine or cause to be examined upon oath or affirmation, as the case may require, parties and witnesses by word of mouth, and may, either before or after or with or without such examination, cause them or any of them to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and the court may by writ require such attendance, and order to be produced before itself or otherwise any deeds, evidences, or writings, in the same form, or nearly as may be, as that in which a writ of subpoena ad testificandum, or of subpoena duces tecum, is now issued

Suits for legacies or distribution not to be entertained.

Power to examine witnesses.

As to production of deeds, &c.

[*Extended to registrars, C. P. A. 1858, s. 23.*]

C. P. A. 1857. by any of her Majesty's superior courts of law at Westminster; and every person disobeying any such writ shall be considered as in contempt of the court, and also be liable to forfeit a sum not exceeding one hundred pounds.

Powers of the court to enforce orders.

25. The court of probate shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear, or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the court under this act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the court under this act as are by law vested in the high court of chancery for such purposes in relation to any suit or matter depending in such court.

Order to produce any instrument purporting to be testamentary.

26. The court of probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the court may direct such person to attend for the purpose of being examined in open court, or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the court.

Registrars, &c. to have power to administer oaths.

Power to appoint, also, commissioners to administer oaths, &c.

27. The registrars and district registrars shall respectively have full power to administer oaths; and all persons who at the commencement of this act shall be acting as surrogates of any ecclesiastical court, and any other persons whom the judge shall, under the seal of the court, from time to time appoint, shall respectively have full power to administer oaths and perform such other duties in reference to matters

and causes testamentary as may be assigned to them from time to time by the rules and orders under this act; and the persons so appointed shall be styled "commissioners of her Majesty's court of probate"; provided, that any party required to be examined, or any person called as a witness or required or desiring to make an affidavit or deposition under or for the purposes of this act, shall be permitted to make his solemn affirmation or declaration instead of being sworn in the circumstances and manner in which a person called as a witness or desiring to make an affidavit or deposition would be permitted so to do under the Common Law Procedure Act, 1854, in cases within the provisions of that act: and any person who shall wilfully give false evidence, or who shall wilfully swear, affirm or declare falsely in any affidavit or deposition before the court of probate, or before any registrar, district registrar, or commissioner of the court, shall be liable to the penalties and consequences of wilful and corrupt perjury.

28. If any person forge the signature of any registrar, district registrar, or commissioner for taking oaths, or forge or counterfeit any seal of the court of probate, or knowingly use or concur in using any such forged or counterfeit signature or seal, or tender in evidence any document with a false or counterfeit signature of such registrar, district registrar, or commissioner, or with a false or counterfeit seal, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of his life or any term not less than seven years, or to imprisonment for any term not exceeding three years, with or without hard labour.

Penalty on forging or counterfeiting seals or signatures of officers.

29. The practice of the court of probate shall, except where otherwise provided by this act, or by the rules or orders to be from time to time made under this act, be, so far as the circumstances of the case will admit, according to the present practice in the prerogative court.

Practice of the court.

30. And to the intent and end that the procedure and practice of the court may be of the most simple and expeditious character, it shall be lawful for the lord chancellor, at any time after the passing of this act, with the advice and assistance of the lord chief justice of the court of queen's bench, or any one of the judges of the superior courts of law to be by such chief justice named in that behalf, and of the judge of the said prerogative court, to make rules and orders, to take effect when this act shall come into operation, for regulating the procedure and practice of the court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious

Rules and orders to be made for regulating the procedure of the court.

C. P. A. 1857. and what shall be deemed non-contentious business, and subject to the express provisions of this act, for fixing and regulating the time and manner of appealing from the decisions of the said court, and generally for carrying the provisions of this act into effect; and after the time when this act shall come into operation it shall be lawful for the judge of the court of probate from time to time, with the concurrence of the lord chancellor and the said lord chief justice, or any one of the judges of the superior courts of law to be by such chief justice named in this behalf, to repeal, amend, add to, or alter any such rules and orders as to him, with such concurrence as aforesaid, may seem fit.

Mode of
taking evi-
dence in
contentious
matters.

31. Subject to the regulations to be established by such rules and orders as aforesaid, the witnesses, and where necessary the parties, in all contentious matters where their attendance can be had, shall be examined orally by or before the judge in open court: provided always, that, subject to any such regulations as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party orally in open court as aforesaid, and after such cross-examination may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed.

Court may
issue commis-
sions or give
orders for
examination
of witnesses
abroad or who
are unable to
attend.

32. Provided, that where a witness in any such matter is out of the jurisdiction of the court, or where, by reason of his illness or otherwise, the court shall not think fit to enforce the attendance of the witness in open court, it shall be lawful for the court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the court to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said court, or other person to be named in such order for the purpose; and all the powers given to the courts of law at Westminster by the acts of the thirteenth year of king George the third, chapter sixty-three, and of the first year of king William the fourth, chapter twenty-two, for enabling the courts of law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such courts, and to enforce such examination, and all the provisions of the said acts, and of any other acts for enforcing or otherwise applicable to such examination, and the witnesses examined, shall extend and be applicable to the said court of probate and to the examination of witnesses under the commissions and orders of the said court, and to the witnesses examined, as if such court were one of the courts of law at Westminster,

and the matter before it were an action pending in such C. P. A. 1857. court.

33. The rules of evidence observed in the superior courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the court of probate.

Rules of evidence in common law courts to be observed.

34. It shall be lawful for the judge of the court of probate to sit with the assistance of any judge or judges of any of the superior courts of law at Westminster, who, upon the request of the judge of the court of probate, may find it convenient to attend for that purpose.

Common law judges may sit, on request of judge of court.

35. It shall be lawful for the court of probate to cause any question of fact arising in any suit or proceeding under this act to be tried by a special or common jury before the court itself, or by means of an issue to be directed to any of the superior courts of common law, in the same manner as an issue may now be directed by the court of chancery, and such question shall be so tried by a jury in any case where an heir-at-law, cited or otherwise made party to the suit or proceeding, makes application to the court of probate for that purpose; and in any other case where all the parties to the suit or proceeding concur in such an application, and where any party or parties other than such heir-at-law make a like application (the other party or parties not concurring therein), and the court shall refuse to cause such question to be tried by a jury, such refusal of the court shall be subject to appeal as herein provided.

Court may cause questions of fact to be tried by a jury before itself, or direct an issue to a court of law.

36. When the court shall order a question of fact to be tried before itself by a jury, the court may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the superior courts of common law at Westminster, and may also make any other orders which to such court may seem requisite; and every such jury shall consist of persons possessing the qualifications, and shall be struck, summoned, balloted for, and called in like manner as if such jury were a jury for the trial of any cause in any of the said superior courts; and every jurymen so summoned shall be entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said superior courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause; and generally for all purposes of or auxiliary to the trial of questions of fact by a jury before the court itself, and in respect of new trials thereof, and also for all purposes in relation to or consequential upon the direction of issues, the court of probate shall

Powers of the court for the trial of questions by a jury.

C. P. A. 1857. have the same jurisdiction, powers, and authority in all respects as belong to any superior court of common law, or to any judge thereof, or to the high court of chancery, or any judge thereof, for the like purposes.

Question to be stated, and jury sworn to try it. 37. When any such question shall be so ordered to be tried by a jury before the court itself, such question shall be reduced into writing in such form as the court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the court of probate shall have the same powers, jurisdiction, and authority as belong to any judge of any of the said superior courts sitting at nisi prius.

Court, on trial, to have the same authority as a judge at nisi prius.

Court may direct where issues shall be tried.

38. Where the court of probate directs an issue, it shall be lawful for such court to direct such issue to be tried either before a judge of assize in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the court of chancery.

Appeal to the house of lords.

39. Any person considering himself aggrieved by any final or interlocutory decree or order of the court of probate may appeal therefrom to the house of lords: provided always, that no appeal from any interlocutory order of the court of probate shall be made without leave of the court of probate first obtained, but on the hearing of an appeal from any final decree all interlocutory orders complained of shall be considered as under appeal as well as the final decree.

Advocates admitted to practise.

Barristers may practise in contentious causes.

Extended to all causes and matters whatsoever (d).

Advocates admitted to practise as barristers.

40. All persons who at the time of the passing of this act have been admitted advocates in any of the ecclesiastical courts shall be entitled to practise as advocates or counsel in all matters and causes whatsoever in the court of probate; and all serjeants and barristers-at-law shall be entitled to practise as advocates or counsel in all contentious matters and causes in the said court; and such persons who have been so admitted advocates and serjeants and barristers-at-law shall have respectively the same rank and precedence which they now have before the judicial committee of the privy council, unless and until her Majesty shall otherwise order.

41. All persons who at the time of the passing of this act have been admitted as advocates as aforesaid shall be entitled to practise as counsel in any of her Majesty's courts of law or equity in England, with the same eligibility to appointments, under acts of parliament or otherwise, as if they had respectively been duly called to the degree of barrister-at-law on the days on which they respectively were so admitted as advocates, and with the same rank and precedence which they

now have before the said judicial committee, unless and until C. P. A. 1857. her Majesty shall otherwise order.

42. Every person who at the time of the passing of this act is actually admitted and practising as a proctor in the courts in Doctors' Commons, or in the prerogative court of York, or in any diocesan court, or in any archidiaconal court, having previously duly served under articles of clerkship either to an attorney or proctor, may upon his application, at any time within one year after the passing of this act, be admitted a proctor of the court of probate, without payment of any fee or stamp duty.

Proctors
admitted to
practise.

43. Every person who at the time of the commencement of this act is acting as registrar or deputy registrar of any ecclesiastical court, or is actually admitted and practising as a proctor in the courts in Doctors' Commons, or in any ecclesiastical court in England or Wales, may, within one year after the passing of this act, be admitted, without the payment of any stamp duty, fee, charge or gratuity whatsoever, as a solicitor of the high court of chancery upon the production of his appointment or admission as such registrar, deputy registrar, or proctor, or an official certificate thereof; and upon the production of an official certificate that such appointment or admission continued in force at the time of the passing of this act, and upon signing the roll of solicitors of the high court of chancery, but not otherwise, such person shall be entitled to be admitted as a solicitor of such court and to be afterwards in like manner admitted and enrolled as an attorney of her Majesty's superior courts.

Admission of
registrars and
proctors as
solicitors.

44. Every person who at the time of the commencement of this act has served or is actually serving as an articulated clerk to a proctor entitled to take such articulated clerk, and who has not been admitted as a proctor, shall be entitled to be admitted as a solicitor of the high court of chancery, in the same manner, and subject to the same rules and regulations, and upon the same conditions, as if he had before the commencement of this act been articulated to a solicitor or to an attorney-at-law; and such admission shall entitle such articulated clerk so admitted as a solicitor to be afterwards in like manner admitted and enrolled as an attorney of her Majesty's superior courts: provided, that if any such proctor to whom any such clerk is now articulated shall retire from practice after the passing of this act, he shall and is hereby required to transfer such articulated clerk to some other proctor, or to a solicitor, or to an attorney-at-law, for the unexpired term of his articles of clerkship; provided that the court shall at any time have the same power to transfer such clerk during the unexpired term of his articles of clerkship, to any other proctor, or to a solicitor, or to an attorney-at-law as the judge of the pre-

Admission of
articled clerks
to proctors as
solicitors.

C. P. A. 1857. rogative court now has in respect to clerks articted to proctors practising in the court of arches.

Practitioners. 45. All solicitors and attornies-at-law may practise in the court of probate, and the laws and statutes now in force concerning solicitors and attorneys shall extend to solicitors and attornies practising in the said court; and the commissioners for taking oaths in the high court of chancery shall be commissioners for taking oaths in the court of probate.

Probates and administration may be granted in common form by district registrars if it shall appear by affidavit that the testator, &c. had a fixed place of abode. 46. Probate of a will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the court of probate and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit, and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly.

Affidavit to be conclusive for authorizing grant of probate. 47. Such affidavit shall be conclusive for the purpose of authorizing the grant, by the district registrar, of probate or administration; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death; and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required.

District registrars not to make grants where there is contention, &c. 48. The district registrar shall not grant probate or administration in any case in which there is contention as to the grant until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form.

As to transmission of notice of application for grants of probate, &c. to district registrar. 49. Notice of every application to any district registrar for the grant of probate or administration shall be transmitted by such district registrar to the registrars of the principal registry by the next post after such application shall have been made; and such notice shall specify the name and description, or addition (if any), of the testator or intestate, the time of his death, and the place of his abode at his decease, as stated in the affidavit made in support of such application, and the name of the person by whom the application has been made, and such other particulars as may be directed by rules or orders under this act; and no probate or

administration shall be granted in pursuance of such application until such district registrar shall have received a certificate, under the hand of one of the registrars of the principal registry, that no other application appears to have been made in respect of the goods of the same deceased person, which certificate the said registrar of the principal registry shall forward as soon as may be to the district registrar; all such notices in respect of applications in the district registries shall be filed and kept in the principal registry, and the registrars of the principal registry shall, with reference to every such notice, examine all notices of such applications which may have been received from the several other district registries, and the applications which may have been made for grants of probate or administration at the principal registry, so far as it may appear necessary to ascertain whether or no application for probate or administration, in respect of the goods of the same deceased person, may have been made in more than one registry, and shall communicate with the district registrars as occasion may require in relation to such applications.

50. In every case where it appears to a district registrar that it is doubtful whether the probate or letters of administration which may be applied for should or should not be granted, or where any question arises in relation to the grant or application for the grant, of any probate or administration, the district registrar shall transmit a statement of the matter in question to the registrars of the court of probate, who shall obtain the directions of the judge in relation thereto, and the judge may direct the district registrar to proceed in the matter of the application according to such instructions as to the judge may seem necessary, or may forbid any further proceeding by the district registrar in relation to the matter of such application, leaving the party applying for the grant in question to make application to the court of probate through its principal registry, or, if the case be within its jurisdiction, to a county court.

District registrar in case of doubt as to grant to take the directions of the judge.

51. On the first Thursday of every month, or oftener, if required by any rules or orders to be made in that behalf, every district registrar shall transmit to the registrars of the principal registry a list, in such form and containing such particulars as may be from time to time required by the court of probate, or by any rules or orders under this act, of the grants of probate and administration made by such district registrar up to the last preceding Saturday, and not included in a previous return, and also a copy, certified by the district registrar to be a correct copy, of every will to which any such probate or administration relates.

District registrars to transmit lists of probates and administrations, and copies of wills.

52. Every district registrar shall file and preserve all

District registrars to pre-

C. P. A. 1857. original wills of which probate or letters of administration with the will annexed may be granted by him, in the public registry of the district, subject to such regulations as the judge of the court of probate may from time to time make in relation to the due preservation thereof, and the convenient inspection of the same.

As to caveats. 53. Caveats against the grant of probates or administrations may be lodged in the principal registry or in any district registry, and (subject to any rules or orders under this act) the practice and procedure under such caveats in the court of probate shall, as near as may be, correspond with the practice and procedure under caveats now in use in the prerogative court of Canterbury; and immediately upon a caveat being lodged in any district registry, the district registrar shall send a copy thereof to the registrars to be entered among the caveats in the principal registry; and immediately upon a caveat being entered in the principal registry, notice thereof shall be given to the district registrar of the district, if any, in which it is alleged the deceased resided at the time of his decease, and to any other district registrar to whom it may appear to the registrar of the principal registry expedient to transmit the same.

54. [Repealed by C. P. A. 1858, s. 11.]

Registrar of county court to transmit certificate of decree for grant or revocation of probate.

55. On a decree being made by a judge of a county court for the grant or revocation of a probate or administration in any such cause, the registrar of the county court shall transmit to the district registrar of the district in which it shall have been sworn that the deceased had at the time of his decease his fixed place of abode, a certificate under the seal of the county court of such decree having been made, and thereupon on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree.

The judge of the county court to decide causes and enforce judgments as in other cases.

56. The judge of any county court before whom any disputed question shall be raised relating to matters and causes testamentary under this act shall, subject to the rules and orders under this act, have all the jurisdiction, power, and authority to decide the same and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the county court.

Affidavit of the facts giving the county court jurisdiction to

57. The affidavit as to the place of abode and state of the property of a testator or intestate which is to give contentious jurisdiction to the judge of the county court under the previous provisions shall, except as hereinafter provided, be

conclusive for the purpose of authorizing the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the jurisdiction of such judge or within any of the said districts at the time of his death, or by reason that the personal estate sworn to be under the value of two hundred pounds did in fact amount to or exceed that value, or that the value of the real estate of or to which the deceased was seised or entitled beneficially at the time of his death amounted to or exceeded three hundred pounds: provided, that where it shall be shown to the judge of a county court before whom any matter is pending under this act that the place of abode or state of the property of the testator or intestate in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration has not been correctly stated in the affidavit, and if correctly stated would not have authorized him to exercise such contentious jurisdiction, he shall stay all further proceedings in his court in the matter, leaving any party to apply to the court of probate for such grant or revocation, and making such order as to the costs of the proceedings before him as he may think just.

C. P. A. 1857.
be conclusive, unless disproved while the matter is pending.

58. Any party who shall be dissatisfied with the determination of the judge of the county court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this act, may appeal from the same to the court of probate in such manner and subject to such regulations as may be provided by the rules and orders to be made under this act, and the decision of the court of probate on such appeal shall be final.

As to appeals from county court.

59. It shall not be obligatory on any person to apply for probate or administration to any district registry, or through any county court, but in every case such application may be made through the principal registry of the court of probate wherever the testator or intestate may at the time of his death have had his fixed place of abode: provided, that where in any contentious matter arising out of any such application it is shown to the court of probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a county court, the court of probate may send the cause to such county court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his court in the first instance.

Not obligatory to apply for probate, &c. to district registries or county court, but may in every case be made to court of probate.

[Extended to revocations of grants,
C. P. A. 1858, s. 12.]

60. For regulating the procedure and practice of the county courts, and the judges, registrars, and officers thereof

Rules and orders for regulating the

C. P. A. 1857.
 procedure of
 county courts
 under the act
 to be made by
 the judges
 now having
 authority for
 the like pur-
 pose.

in relation to their jurisdiction and proceedings under this act, rules and orders may be from time to time framed, amended, and certified by the county court judges appointed for the time being to frame rules and orders for regulating the practice of the county courts under the act of the session holden in the nineteenth and twentieth years of her majesty, chapter one hundred and eight, and shall be subject to be allowed or disallowed or altered, and shall be in force from the day named for that purpose by the lord chancellor, as in the said act is provided in relation to other rules and orders regulating the practice of the same courts; and for establishing rules and orders to be in force when this act comes into operation, the power given by this enactment shall be exercised as soon as conveniently may be after the passing of this act.

Where a will
 affecting real
 estate is
 proved in
 solemn form,
 or is the sub-
 ject of a con-
 tentious
 proceeding,
 the heir and
 persons inte-
 rested in the
 real estate to
 be cited.

61. Where proceedings are taken under this act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this act the validity of a will is disputed, unless in the several cases aforesaid, the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this act, and to the rules and orders under this act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the court.

Where the
 will is proved
 in solemn
 form, or its
 validity
 otherwise
 decided on,
 the decree of
 the court to
 be binding on
 the persons
 interested
 in the real
 estate.

62. Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her majesty's court of probate, shall in all courts and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this act, such decree or order shall enure for the benefit

of the heir-at-law or other persons against whose interest in C. P. A. 1857. real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders.

63. Nothing herein contained shall make it necessary to cite the heir-at-law or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the court and the court is satisfied that the deceased was at the time of his decease seised of or entitled to or had power to appoint by will some real estate beneficially, or in any case where the will propounded or of which the validity is in question, would not in the opinion of the court, though established as to personalty, affect real estate, but in every such case, and in any other case in which the court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the court may proceed without citing the heir or other persons interested in real estate, provided that the probate, decree, or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

Heir in certain cases not to be cited, and where not cited not to be affected by probate.

64. In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the court of probate: and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition.

Probate or office copy to be evidence of the will in suits concerning real estate, save where the validity of the will is put in issue.

65. In every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the court or judge before whom such evidence shall be

As to costs of proof of will."

C. P. A. 1857. given to direct by which of the parties the costs thereof shall be paid.

Place of
deposit of
original wills.

66. There shall be one place of deposit under the control of the court of probate, at such place in London or Middlesex as her majesty may by order in council direct, in which all the original wills brought into the court or of which probate or administration with the will annexed is granted under this act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the court may direct, shall be deposited and preserved, and may be inspected under the control of the court and subject to the rules and orders under this act.

Judge to
cause calen-
dars to be
made from
time to time
in the prin-
cipal registry,
and to be
printed.

67. The judge shall cause to be made from time to time in the principal registry of the court of probate calendars of the grants of probate and administration in the principal registry, and in the several district registries of the court, for such periods as the judge may think fit, each such calendar to contain a note of every probate or administration with the will annexed granted within the period therein specified, and also a note of every other administration granted within the same period, such respective notes setting forth the dates of such grants, the registry in which the grants were made, the names of the testators and intestates, the place and time of death, the names and descriptions of the executors and administrators, and the value of the effects; and the calendars to be so made shall be printed as the same are from time to time completed.

Registrar to
transmit
printed copies
to certain
offices.

68. The registrars shall cause a printed copy of every calendar to be transmitted through the post or otherwise to each of the district registries, and to the office of her majesty's prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices, if any, as the court of probate shall from time to time by rule or order direct; and every printed copy of a calendar so transmitted as aforesaid shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected.

Official copy
of whole or
part of will
may be
obtained.

69. An official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this act.

Administra-
tion pendente
lite.

[*Extended to
appeals,
C. P. A. 1858,
s. 22.*]

70. Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the court of probate may appoint an administrator of the personal estate of

such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the court, and act under its direction. C. P. A. 1857.

71. It shall be lawful for the court of probate to appoint any administrator appointed as aforesaid or any other person to be receiver of the real estate of any deceased person pending any suit in the court touching the validity of any will of such deceased person by which his real estate may be affected, and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the court may direct. Receiver of real estate pendente lite. [The court may require security from receivers, C. P. A. 1858, s. 21.]

72. The court of probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the court think fit. Remuneration to administrators pendente lite and receivers.

73. Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the united kingdom of Great Britain and Ireland, and it shall appear to the court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who if this act had not been passed would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the court to grant administration of the personal estate of such deceased person to the person who if this act had not passed would by law have been entitled to a grant thereof, but it shall be lawful for the court, in its discretion, to appoint such person as the court shall think fit to be such administrator upon his giving such security (if any) as the court shall direct, and every such administration may be limited as the court shall think fit. Power as to appointment of administrator.

74. The provisions of an act passed in the thirty-eighth year of his late majesty king George the third, chapter eighty-seven, shall apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her majesty's courts of law and equity. 38 Geo. 3, c. 87, extended to administrators.

C. P. A. 1857.

After grant of administration no person to have power to sue as an executor.

Revocation of temporary grants not to prejudice actions or suits.

Payments under revoked probates or administration to be valid.

Persons, &c. making payment upon probates granted for estate of deceased person to be indemnified.

Rights of an executor renouncing probate to cease, as if he had not been named in the will.

Sureties to administration bonds.

75. After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked.

76. Where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator, in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such court may direct.

77. Where any probate or administration is revoked under this act, all payments *bond fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration shall be afterwards granted might have lawfully made.

78. All persons and corporations making or permitting to be made any payment or transfer *bond fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.

79. Where any person, after the commencement of this act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor.

80. So much of an act passed in the twenty-first year of king Henry the eighth, chapter five, and of an act passed in the twenty-second and twenty-third years of king Charles the second, chapter ten, and of an act passed in the first year of king James the second, chapter seventeen, as requires any surety, bond or other security to be taken from a

person to whom administration shall be committed, shall be repealed. C. P. A. 1857.

81. Every person to whom any grant of administration shall be committed shall give bond to the judge of the court of probate to enure for the benefit of the judge for the time being, and, if the court of probate or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct; provided that it shall not be necessary for the solicitor for the affairs of the treasury or the solicitor of the duchy of Lancaster applying for or obtaining administration to the use or benefit of her majesty to give any such bond as aforesaid.

Persons to whom grant of administration shall be committed shall give bond.

[Bonds given before 11th January, 1858, enure to the benefit of the judge of this Court, C. P. A. 1858, s. 15.]

82. Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the court or district registrar so to do, and the court or district registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the court or district registrar shall think reasonable.

Penalty on bond.

83. The court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond.

Power of court to assign bond.

84. All suits, whether original or by way of appeal, which at the commencement of this act shall be pending in any court in England respecting any grant of probate or administration, shall be transferred with all the proceedings therein, to the court of probate, there to be dealt with and decided according to the rules and practice of the said court, except so far as such court may think it expedient to adopt, for the purposes of such transferred suits or any of them, the rules or practice of the court in which the same shall have been pending, to which end the court of probate shall for the purposes of such suits, have all the jurisdiction, power and authority possessed by the court from which such suit

Pending suits transferred to court of probate.

C. P. A. 1857. shall be transferred; but this enactment shall not apply to proceedings by way of appeal pending before her majesty in council, which proceedings shall be carried on and prosecuted in the same manner in all respects as if this act had not passed; and every person who if this act had not passed might have appealed to her majesty in council against any proceeding, decree or sentence of any court respecting the grant of any probate or administration, may, notwithstanding this act, appeal to her majesty in council against such proceeding, decree or sentence: provided also, that her majesty in council may remit to the court of probate any cause or proceeding pending by way of appeal as aforesaid, or to be brought before her majesty in council upon appeal as aforesaid, with such directions as the justice of the case may require.

Power to judges whose jurisdiction is determined to deliver written judgments.

85. Provided, that if at the commencement of this act any cause which would be transferred to the court of probate under the enactment hereinbefore contained shall have been heard before any judge having jurisdiction in relation to such cause before the commencement of this act, and shall be standing for judgment, such judge may, at any time within six weeks after the commencement of this act, give in to one of the registrars of the court a written judgment thereon, signed by him, and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment; and every such decree or order shall have the same force and effect as if it had been drawn up in pursuance of a judgment of the court of probate on the day on which the same shall so be delivered to the registrar, and shall be subject to appeal under this act.

Void and voidable probates and administrations.

86. All grants of probates and administrations made before the commencement of this act, which may be void or voidable by reason only that the courts from which respectively the same were obtained had not jurisdiction to make such grants, shall be as valid as if the same had been obtained from courts entitled to make such grants: provided that any such grants of probate or administration shall not be made valid by this act when the same shall before the commencement of this act have been revoked or determined by any court of competent jurisdiction to have been void; nor shall this act prejudice or affect any proceedings pending at the time of the passing of this act in which the validity of any such probate or administration shall be in question: if the result of such proceedings shall be to invalidate the same, such probate or administration shall not be rendered valid by this act; and if such proceedings abate or become defective by reason of the death of any party, any person who but for this act would have any right by reason of the invalidity of such probate or administration shall retain such right, and

may commence proceedings for enforcing the same within six calendar months after the death of such party. C. P. A. 1857.

87. Legal grants of probate and administration made before the commencement of this act, and grants of probate and administration made legal by this act, shall have the same force and effect as if they had been granted under this act, but in every such case there shall be due and payable to her majesty such further stamp duty, if any, as would have been chargeable on any probate or administration which but for this act would or ought to have been obtained in respect of the personal estate not covered by the grant; and all inventories and accounts in respect thereof shall be returnable to the court of chancery, and all bonds taken in respect thereof may be enforced by or under the authority of the court of chancery, at the discretion of the court.

88. Provided, that where any probate or administration has been granted before the commencement of this act, and the deceased had personal estate in England not within the limits of the jurisdiction of the court by which the probate or administration was granted, or otherwise not within the operation of the grant, it shall be lawful for the court of probate to grant probate or administration only in respect of such personal estate not covered by any former probate or administration, and such grant may be limited accordingly.

89. The acting judge and registrar of every court, and other person now having jurisdiction to grant probate or administration, and every person having the custody of the documents and papers of or belonging to such court or person, shall, upon receiving a requisition for that purpose, under the seal of the court of probate, from a registrar, and at the time and in the manner mentioned in such requisition, transmit to the court of probate, or to such other place as in such requisition shall be specified, all records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be easy of reference, under the control and direction of the court.

90. No judge, registrar or other person who shall wilfully refuse or neglect so to transmit such records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents or any other instrument relating to matters or causes testamentary, shall be entitled to any compensation under this act, and every judge, regis-

Probates and administrations granted before this act comes into operation.

Probate or administration may be granted of personal estate not affected by the former grants.

Judges of present ecclesiastical courts and others to transmit all wills, &c. to the registry.
[See C. P. A. 1858, s. 27.]

Penalty for default.

C. P. A. 1857. trar or other person so refusing or neglecting shall be liable to a penalty of one hundred pounds, to be sued for and recovered, together with full costs of suit, in any of her majesty's superior courts, by the registrars.

As to depositories for safe custody of the wills of living persons. 91. One or more safe and convenient depository or depositories shall be provided, under the control and directions of the court of probate, for all such wills of living persons as shall be deposited therein for safe custody; and all persons may deposit their wills in such depository upon payment of such fees and under such regulations as the judge shall from time to time by any order direct.

This act not to affect the stamp duties on probates and administrations. 92. Nothing in this act contained shall affect the stamp duties now by law payable upon probates and administrations: and all the clauses, provisions, rules, regulations, and directions contained in any act of parliament relating to the said duties, and to wills, probates of wills, and letters of administration, for securing the said duties, not superseded by or inconsistent with the express provisions of this act, shall be in full force, and shall be observed, applied, and put in execution for securing the duties payable on probates of wills and letters of administration granted under this act, as if such duties had been granted by this act, and the said clauses, provisions, rules and regulations relating thereto were herein repeated and specially enacted.

The registrars to deliver copies of wills, &c. to the commissioners of inland revenue. 93. The registrars of the court of probate shall, within such period as the judge shall direct after probate of any will or letters of administration shall have been granted, deliver or cause to be delivered to the commissioners of inland revenue, or their proper officer, the following documents respectively; that is to say, in the case of a probate or administration with a will annexed a copy of the will and the original affidavit, and in the case of letters of administration without a will annexed such original affidavit, and in every case of letters of administration a copy or extract thereof, and in every case such certificate or note of the grant as the said commissioners may require.

Sections 8 & 9 of 53 Geo. 3, c. 127, repealed in part as to the court of probate. 94. Whereas by an act passed in the fifty-third year of king George the third, chapter one hundred and twenty-seven, it is enacted, that if any proctor of any ecclesiastical court shall act as such, or permit his name to be used in any suit appertaining to the office of a proctor, or in obtaining probates of wills or letters of administration, for or on account or for the profit or benefit of any person not entitled to act as a proctor, or shall permit any such person to participate in such profit or benefit, such proctor shall be subject to certain penalties therein mentioned; and it is also therein further enacted, that if any person shall, in his own name or in that of any other person, do or perform any act whatever belong-

ing to the office of a proctor in consideration of any gain, fee or reward, or with a view to participate in the benefit to be derived from the office, functions or practice of a proctor, without being admitted and enrolled, every such person shall be subject to certain other penalties therein mentioned: be it enacted, nothing in the said act contained shall prevent any proctor of the court of probate from acting as agent of any attorney or solicitor in relation to any matter testamentary, or from allowing him to participate in the profits of and incident thereto. C. P. A. 1857.

95. The lord chancellor, with such assistance as is hereinbefore provided as to rules and orders to be made in pursuance of this act, shall, as soon as conveniently may be after the passing of this act, fix a table or tables of fees to be taken by the officers of the court of probate, and the proctors, solicitors and attornies practising therein, including the district registrars, and the proctors, solicitors and attornies practising in district registries, and of fees to be taken by the officers of the county courts in respect of business under this act, and of fees to be payable in respect of searches, inspection, and printed and other copies of and extracts from records, wills and other documents in the custody or under the control of the court of probate, and the judge of the court of probate, with such concurrence as is hereinbefore provided in respect of the amendment of rules and orders, is hereby empowered, from time to time after this act shall come into operation, to add to, reduce, alter or amend such table or tables of fees, as he may see fit: provided that such tables of fees and every alteration of the same, except so far as respects the fees which are to be taken by district registrars, proctors and others, for their own remuneration and to their own use, shall be subject to the approval of the commissioners of her majesty's treasury: and every such table of fees, and every addition, reduction, alteration or amendment to, in, or of the same, shall be published in the *London Gazette*; and no other fees than those specified and allowed in such tables of fees shall be demanded or taken by such officers and proctors, solicitors and attornies. Fees to be taken by officers of court and by officers of county courts.

96. The bill of any proctor, attorney or solicitor, for any fees, charges or disbursements in respect of any business transacted in the court of probate, whether contentious or otherwise, or any matters connected therewith, shall, as well between proctor or attorney or solicitor and client as between party and party, be subject to taxation by any one of the registrars of the said court, and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under this act, and the certificate of the Taxation of costs.

C. P. A. 1857. registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said court.

Fees not to be paid in money, but by stamps.

97. None of the fees payable to the officers of the court of probate, or of any county court, in respect of business under this act, except the fees of the district registrars (which are to be taken as their remuneration, and for their own use), the fees of proctors, solicitors and attornies, and such fees as may be authorized to be taken for their own use by surrogates and commissioners for administering oaths, shall be received in money, but every such fee shall be collected and received by a stamp denoting the amount of the fee which otherwise would be payable.

Provisions of acts relating to stamps to be applicable to stamps for collecting fees.

98. The fees to be collected by means of stamps under the provisions of this act shall be deemed "Stamp Duties," and shall be placed under the management of the Commissioners of Inland Revenue, to be collected and paid into the exchequer under the same laws and regulations as those made in respect of the other duties of "stamps," and the provisions in the several acts for the time being in force relating to stamps under the care or management of the Commissioners of Inland Revenue shall in all cases not hereby expressly provided for be of full force and effect with respect to the stamps to be provided under or by virtue of this act, and to the vellum, parchment, or paper on or to which the same stamps shall be impressed or affixed, and be applied and put in execution for collecting and securing the sums of money denoted thereby, and for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully and effectually, to all intents and purposes, as if such provisions had been herein repeated and specially enacted with reference to the said last-mentioned stamps and sums of money respectively; but a separate and distinct account of all money received in respect of the said last-mentioned stamps for every year ending the thirty-first day of March shall be laid before both Houses of Parliament within one month after the termination of such year of accounts, or, if Parliament be not then sitting, within one month after the commencement of the next session of Parliament.

No document to be received or used unless stamped.

99. No document which, under this act, and any table of fees for the time being in force under this act, ought to have a stamp in respect of such fee impressed thereon or affixed thereto, shall be received or filed or be used in relation to any proceeding in the court of probate, or be of any validity for any purpose whatsoever, unless or until the same shall have the proper stamp impressed thereon or affixed thereto; provided that if at any time it shall appear that any such document has through mistake or inadvertence been received or filed, or used without having such stamp impressed thereon, or affixed there-

to, it shall be lawful for the judge of the court of probate, if he think fit, to order that such stamp shall be impressed thereon or affixed thereto, and thereupon, when a stamp shall have been impressed on such document or affixed thereto in compliance with any such order, such document and every proceeding in reference thereto shall be as valid and effectual as if such stamp had been impressed thereon or affixed thereto in the first instance.

100. If any officer of the court of probate, or any other person employed under this act, shall do or commit or connive at any fraudulent act or practice in relation to any stamp to be used under the provisions of this act, or to any fee or sum of money to be collected, or which ought to be collected, by means of any such stamp, or if any such officer or person shall be guilty of any wilful act, neglect or omission whereby any fee or money which ought to be collected by means of a stamp under this act shall be lost, or the payment thereof evaded, every such officer or person so offending shall be dismissed from his office or employment if the judge of the court of probate shall think fit so to order.

101. The salary of the judge of the court of probate, and any retiring annuity granted to a judge of the court of probate under this act, and all compensations payable under this act, shall be charged on and payable out of the consolidated fund of the united kingdom.

102. It shall be lawful for the commissioners of her majesty's treasury, out of such monies as may be provided and appropriated by parliament for the purpose, to cause to be paid all salaries payable to the registrars, clerks and other officers under this act, and all necessary expenses of the court of probate and its registries, and other expenses which may be incurred in carrying the provisions of this act into effect (except such salary, retiring annuity and compensations as are herebefore charged on the said consolidated fund).

103. It shall be lawful for the commissioners of the treasury to grant to any archdeacons, judges, deputy judges, registrars, deputy registrars, and other persons holding office in the courts now exercising jurisdiction in matters and causes testamentary who may sustain any loss of emoluments by reason of the passing of this act, and who are not transferred or appointed by or under this act to offices of equal value in the court of probate, such compensation as, having regard to the tenure of their respective offices and appointments, and to the provisions of the act of the session holden in the sixth and seventh years of king William the fourth, chapter seventy-seven, section twenty-five, and of the act of the session holden in the tenth and eleventh years of her majesty, chapter ninety-eight, section nine, and the several

C. P. A. 1857.

Officers of the court may be dismissed for fraud or wilful neglect in relation to stamps.

Salary of judge and compensation to be charged on consolidated fund.

Salaries and expenses not charged on the consolidated fund to be paid out of monies to be provided by parliament.

Compensation to registrars, &c. of existing courts.

C. P. A. 1857. subsequent acts continuing the provisions of the said acts respectively, the said commissioners deem just and proper to be awarded: provided that where persons whose claims in respect of offices, held for life or otherwise, are excluded by the said provisions, have executed in person the duties of such offices, the said provisions shall not be deemed to prevent the said commissioners from granting to such persons such compensation as the said commissioners would deem just and proper to be awarded on the abolition or reduction of emoluments of like offices, if held at the pleasure of the crown; and it shall be lawful for the said commissioners to grant to all managing and other clerks who have been continuously employed in the offices of registrars of the said courts for fifteen years and upwards immediately before the passing of this act, and may sustain any loss of emoluments as aforesaid, and are not transferred or appointed as aforesaid, such compensation as the said commissioners may deem just and proper: provided always, that if any person to whom any yearly sum is awarded, for compensation as aforesaid is or shall be appointed to any office or situation under this act, or in the public service, the payment of such compensation shall be suspended so long as he continues to receive the salary or emoluments of such office or situation, if the amount thereof be equal to or greater than the amount of emoluments in respect of the loss whereof compensation is awarded, and if the amount of such last-mentioned emoluments be greater than the salary or emoluments of such office or situation, no more of such compensation shall be paid than will, with such salary or emoluments, be equal to the emoluments in respect of the loss whereof such compensation is payable.

Persons receiving compensation to continue to discharge the remaining duties of their offices.

104. Any person to whom compensation is awarded under this act in respect of the loss of emoluments of any office, and who at the passing of this act shall have been discharging or liable to discharge in respect of such office duties other than those in matters and causes testamentary, shall, so long, as he shall receive such compensation, be bound to discharge such other duties on the same terms on which, whether gratuitously or otherwise, he discharged, or was liable to discharge, the same before the passing of this act.

Compensation to proctors.

105. Whereas the fees or emoluments of the persons now practising as proctors in the courts now exercising jurisdiction in matters and causes testamentary may be damaged by the abolition of the exclusive rights and privileges which they have hitherto enjoyed as such proctors in such courts: be it enacted, that the commissioners of her majesty's treasury, by examination on oath or otherwise, which oath they are hereby authorized to administer, may inquire into and may, by the production of such evidence as they shall think fit

to require, ascertain and absolutely determine the net annual amount of the profits arising from the transaction of business by proctors in matters and causes testamentary, on an average of five years immediately preceding the commencement of this act, or of such proportion of five years as shall have elapsed since each and every such proctor was admitted to practise in such courts, and shall award to each and every such proctor a sum of money or annual payment during the term of his natural life of such amount as shall be equal in value to one half of the net profits derived by such proctor in respect of matters and causes testamentary upon the said average of five years immediately preceding the commencement of this act, or of such proportion of the said five years as shall have elapsed since the admission of each and every such proctor to practise in the courts now exercising jurisdiction in matters and causes testamentary. C. P. A. 1857.

106. And whereas divers proctors practising in the courts now exercising jurisdiction in matters and causes testamentary now are or may at the commencement of this act be associated together in partnership: be it therefore enacted, that in all such cases the commissioners of her majesty's treasury shall inquire into and ascertain the terms or conditions of such partnerships, and shall absolutely determine and award compensation in respect thereof as hereinbefore provided to each of such partnerships, in like manner as if all the emoluments thereof had been derived by one individual, and shall apportion such compensation among the members of each such partnership, with or without benefit of survivorship, regard being had to the existing terms and conditions of the same. Compensation to proctors in partnership.

107. And whereas the most reverend Charles, late Archbishop of Canterbury, by virtue of the power given by an act of the ninth year of king George the Fourth, "to authorize the Lord Archbishop of Canterbury for the time being to appoint a person or persons to the office of registrar of his prerogative, without a previous surrender of the existing grant or grants of the said office," did, by letters patent under his archiepiscopal seal, dated the twenty-first day of June, one thousand eight hundred and twenty-eight, with the confirmation of the dean and chapter of the cathedral and metropolitan Church of Christ, Canterbury, grant the said office of registrar of his prerogative to the Right Honourable Charles Manners Sutton, now Viscount Canterbury, then Charles Manners Sutton, esquire, the eldest son and next heir male of the Right Honourable Charles Manners Sutton, late Viscount Canterbury, for his life, subject and without prejudice to the estates and interest, rights and privileges of the Reverend George Moore and Robert Moore (who then held the said office by virtue of such grant as therein mentioned), and the For the protection of the interests of Viscount Canterbury.

C. P. A. 1857. survivor of them : And whereas by an act passed in the session of parliament held in the second and third years of 2 & 3 Will. 4, the reign of his late majesty King William the Fourth, c. 109. intituled "An Act for settling and securing Annuities on the Right Honourable Charles Manners Sutton and on his next heir male, in consideration of the eminent Services of the said Right Honourable Charles Manners Sutton," it was enacted, that an annuity of four thousand pounds should be payable out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland to the said Right Honourable Charles Manners Sutton late Viscount Canterbury during his life, and that after the decease of the said Charles late Viscount Canterbury one annuity of three thousand pounds be payable out of the said Consolidated Fund to the then heir male of the body of the said Charles late Viscount Canterbury, during the natural life of such heir male ; and it was further enacted, that, in the event of the said Charles now Viscount Canterbury having succeeded to and being in the possession of the said annuity of three thousand pounds, and afterwards becoming entitled to the full possession of the said office of registrar of the prerogative of the lord archbishop of Canterbury, and to the fees, perquisites, profits, and emoluments thereof (provided the same should exceed the annual sum of three thousand pounds), then and in either of the cases aforesaid the said annuity of three thousand pounds should cease and determine and be no longer payable to the said Charles now Viscount Canterbury : provided nevertheless, that if the said fees, perquisites, profits, and emoluments of the said office of registrar should not produce the net annual sum of three thousand pounds to the said Charles now Viscount Canterbury, then there should be issued and paid out of the said Consolidated Fund such a sum of money annually, as, together with the said fees, perquisites, profits, and emoluments, would make a clear annual income to the said Charles now Viscount Canterbury of three thousand pounds : and whereas the said Charles now Viscount Canterbury, upon the decease of the said Charles late Viscount Canterbury, succeeded to and is now in possession of the annuity of three thousand pounds, but he is not yet in possession of the said office of registrar : there shall be awarded to the said Charles now Viscount Canterbury, as a compensation for the fees, perquisites, profits, and emoluments of the said office of registrar of the prerogative of the lord archbishop of Canterbury, an annuity to be calculated upon the average yearly net receipts of the legal fees, perquisites, profits, and emoluments of the said office during such period next preceding the time when this act shall come into operation as the commissioners of her majesty's treasury shall think proper ; and such annuity shall com-

mence from the time of this act coming into operation, if the said Charles Viscount Canterbury shall then be in possession of the said office, and if not then from the time at which the said Charles Viscount Canterbury would have become entitled, but for the passing of this act, to the full possession of the said office, and to the receipt of the fees, perquisites, profits, and emoluments thereof, and shall be paid to the said Charles Viscount Canterbury thenceforth during his life; provided that if the said annuity by way of compensation shall exceed the annual sum of three thousand pounds, then the said annuity of three thousand pounds payable under the last-recited act to the said Charles Viscount Canterbury shall, from and after the commencement of the said annuity by way of compensation, cease and determine, and shall not be payable to the said Charles Viscount Canterbury; and in case the annuity awarded by way of compensation shall be less than the net annual sum of three thousand pounds, the provision contained in the said recited act passed in the session of parliament held in the second and third years of his late majesty King William the Fourth, for the payment unto the heir male of the body of the said Charles Viscount Canterbury, out of the said Consolidated Fund, of such a sum of money annually as, together with the said fees, perquisites, profits, and emoluments, would make up a clear income to him of three thousand pounds, shall, from and after the commencement of the said annuity by way of compensation, be applicable to and be in force for the purpose of making up, together with the said annuity so to be awarded in lieu of such fees, perquisites, profits, and emoluments as aforesaid, a clear annual income of three thousand pounds to the said Charles now Viscount Canterbury during his life.

108. All the claim, title, and interest which at the time of the passing of this act the reverend Robert Moore clerk has or is entitled to in or in respect of the building at present used as the public registry of the prerogative court, shall at the time appointed for the commencement of this act vest in the registrars for the time being of the court, subject to the payment of such rents, and the performance and fulfilment of such contracts in respect thereof, as the said Robert Moore, his executors or administrators, shall be subject to at the time of such vesting.

The registry of prerogative court of Canterbury to vest in registrars of the court.

109. In case Sir John Dodson, the present judge of the prerogative court of Canterbury and dean of the court of arches, be not appointed the first judge of the court of probate, there shall be paid to him during his natural life, as well by way of retiring pension as of salary as dean of the court of arches, the net yearly sum of two thousand pounds, to commence from the time appointed for the coming into operation

Compensation to Sir John Dodson in case he be not appointed judge of the court of probate.

C. P. A. 1857. of this act, and to be paid out of the fund and in manner herein provided for the payment of compensations.

Establish-
ments in dis-
trict regis-
tries.

110. There shall be a clerk or so many clerks in each district registry, and there shall be paid to such clerk or clerks such salary or respective salaries as the judge of the court, with the sanction of the commissioners of her majesty's treasury, may from time to time think fit to direct; and it shall be lawful for such judge to prescribe from time to time the qualifications which shall be possessed by persons appointed to be clerks in such district registries, and generally to regulate the establishment of such district registries with reference to the duties to be performed therein; and the clerk or clerks in each district registry shall be appointed by the district registrar, with the approval of the judge; and every such clerk may be removed by such judge, or by the district registrar with the approval of the judge.

Fees payable
to district
registrars.

111. Each district registrar shall, out of the fees taken by him in respect of the business in his respective district registry, pay the salary or salaries of the clerk or clerks in such registry, and the residue of such fees shall be retained by such district registrar to his own use; and every district registrar shall keep an account of all fees so taken by him as aforesaid, and shall within one month after the end of each year render to the commissioners of her majesty's treasury a faithful account in writing of all such fees received by him during such year: provided that it shall be lawful for the commissioners of her majesty's treasury, at any time after the commencement of this act, to order that the district registrars under this act, or any of them, shall be paid by salaries instead of fees, and to fix the salaries to be payable to them respectively; and thereupon all fees payable to the district registrars so ordered to be paid by salaries shall be accounted for and paid into the exchequer at such times and under such regulations as the commissioners of her majesty's treasury shall direct, and shall be carried to and form part of the consolidated fund of the United Kingdom, and the salaries of such district registrars and of their clerks shall be paid out of such monies as shall be provided by parliament for that purpose, and no such district registrar shall be deemed to have any claim to compensation on account of any diminution of his emoluments by reason of any such order.

District regis-
trars may be
paid by sala-
ries instead of
fees.

Compensation
to clerical
surrogates,
&c.

112. It shall be lawful for the commissioners of the treasury to grant to every clerical surrogate or other clerical person who, at the time of the passing of this act, shall have been appointed surrogate in either of the provinces of Canterbury or York, such compensation for any loss the said surrogates or persons may sustain by the passing of this act as the said commissioners deem just and proper to be awarded; the said

commissioners having regard in awarding such compensation to the circumstance of the said clerical surrogates not being able to follow any other professional employment in lieu of the said office of surrogate. C. P. A. 1857.

113. That every person to whom any compensation shall be granted under this act shall at all times when called upon be liable to fill any public office or situation in England under the crown for which his previous services in any office abolished by this act may render him eligible; and that if he shall decline when called upon so to do to take upon himself such office or situation, and execute the duties thereof satisfactorily, being in a competent state of health, he shall forfeit his right to any compensation or allowances which may have been granted to him in respect of such previous services. Persons receiving compensation to be liable to be called upon to fill offices, &c.

114. The commissioners of her majesty's treasury shall cause to be prepared in each year ending December thirty-one a return of all fees and monies levied in such year under the authority of this act; also a return of the annual salaries of the judge of the said court of probate, and of the registrars, deputy registrars, clerks, and all others holding offices either in London or in the country districts, with an account of all the incidental expenses relating to the offices aforesaid, whether such salaries and expenses be defrayed out of fees or out of any other monies; also a return of all superannuations, pensions, annuities, retiring allowances and compensations made payable under this act in each year, stating the gross amount and the amount in detail of such charges: provided always, that all such returns aforesaid shall be presented to both houses of parliament on or before the thirty-first day of March in each year, if parliament is then sitting, and if parliament is not sitting, then such returns shall be presented within one month of the first meeting of parliament after the thirty-first day of March in each year: provided also, that every district registrar shall keep an account of all fees so taken by him as aforesaid, and shall within one month after the end of each year render to the commissioners of her majesty's treasury a faithful account in writing of all such fees received by him during such year. Publication of accounts.

115. The judge of the court if a privy councillor shall be a member of the judicial committee of the privy council.

116. And whereas, with reference to the abolition of the jurisdiction hereby abolished and otherwise, it is expedient to give, confirm, or extend certain powers to or of "The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts," incorporated under that style and title by letters-patent, dated the twenty-second day of June, in the eighth year of his late majesty King George the Third: be it enacted, that it shall be lawful for the said college from time to time Judge if a privy councillor to be a member of judicial committee. College of doctors of law may let, sell, &c. their real and personal estate, and

C. P. A. 1857. hereafter to let, sell, or exchange for other real or personal estate, or both, all or any part of the real and personal estate which shall for the time being belong to the said college, either directly or through the medium of any trustee or trustees, and to lay out the monies to be received on any such sale or exchange or otherwise, belonging to the said college as aforesaid, in the purchase of other real or personal estate, or both, but so that the said college shall not at any one time hold or enjoy real estate of a yearly value exceeding one thousand pounds in the whole, and to pay, apply and dispose of the income of all the real and personal estate which shall for the time being belong to the said college as aforesaid to or for the benefit of such body or bodies politic or corporate, or person or persons, whether being or including or not being or including, the said college, and all or any individual members or member thereof for the time being, and generally for such purposes and in such manner as the said college shall think fit; and further, to alien and dispose of all or any part of such real and personal estate and the proceeds of any sale thereof, either by way of donation, voluntary disposition or otherwise, unto, between, or amongst any body or bodies politic or corporate, or any person or persons whatsoever, whether being or not being a member or members of the said college: provided always, that no donation or other voluntary disposition of the corpus, or any part of the corpus, of the real and personal estate of the said college, to any person or persons being a member or members thereof at the time of such donation or other voluntary disposition, shall be effectual without the previous consent thereto of a majority of the members of the said college present at any meeting of the college, and the receipt of the treasurer for the time being of the said college shall be an effectual discharge for all gross annual and other sums which shall for the time being belong or be payable to the said college.

College may
surrender
their charter,
and upon such
surrender
shall be dis-
solved.

117. It shall be lawful for the said college, at any time after a resolution to that effect shall have been come to at a meeting of the college, by a majority of the members present at such meeting, to surrender and yield up to her majesty, her heirs or successors, at such time as in such resolution shall be determined, the charter of incorporation of the said college, and all franchises and privileges thereby conferred, or which shall for the time being belong to the said college; and upon and by such surrender the said corporation shall be dissolved, and shall cease to exist, for all purposes whatsoever (except so far as its existence may be requisite for the saving of the rights of her majesty, her heirs and successors, and of all and every person and persons, body and bodies politic or corporate whatsoever, other than the said college), and all real and personal estate which at the time of such dissolution of the said

college shall belong to the said college for its own use and benefit, either directly or through the medium of any trustee or trustees, shall thenceforth belong, for all the estate and interest therein which at the time of such dissolution belonged to the said college absolutely, to all the persons who at the time of such dissolution thereof shall be the president and fellows of the said college, in equal shares as tenants in common, to and for their own use and benefit respectively, but subject to any charges or incumbrances affecting the same at the time of such dissolution, and all real and personal estate of which the said college at the time of such dissolution thereof be seised or possessed, upon any trust or trusts, shall thereupon become vested in the four persons who at the time of such dissolution shall be the president and three senior fellows of the said college, as joint tenants, their heirs, executors, or administrators according to the nature of the real and personal estates respectively, upon the trust or trusts affecting the same respectively.

118. It shall be lawful for the commissioners of her majesty's treasury, out of such monies as may be provided and appropriated by parliament for that purpose, to cause to be purchased, erected, hired, or otherwise provided such offices and buildings as may be suitable for the district registries and depository or depositories for wills, and such buildings, if any, as may be necessary for the court and principal registry, in addition to the building by this act vested in the said registrars, or after the determination of their interest in such building.

Treasury to provide the buildings for registries, &c.

119. All rules and orders to be made under this act concerning procedure and practice, and the table of fees to be fixed under this act, and all alterations thereof, to be from time to time made, shall be laid before both houses of parliament within one month after the making thereof if parliament be then sitting, or if parliament be not then sitting, within one month after the commencement of the then next session of parliament.

Rules and orders to be laid before parliament.

C. P. A. 1857.

SCHEDULE (A).

Districts and Places of District Registries throughout England and Wales.

Districts.	Places of District Registries.
County of Northumberland (a)	Newcastle-on-Tyne.
County of Durham	Durham.
Counties of Cumberland and Westmoreland ..	Carlisle.
West Riding of the county of York	Wakefield.
North Riding ditto	York.
East Riding ditto (b), including the city of York and Ainsty	
County of Lancaster, except the hundred of Salford and West Derby and the city of Manchester.	Lancaster.
City of Manchester and hundred of Salford ..	Manchester.
Hundred of West Derby in Lancashire	Liverpool.
County of Chester (c)	Chester.
Counties of Carnarvon and Anglesea	Bangor.
Counties of Flint, Denbigh and Merioneth ..	St. Asaph.
County of Derby	Derby.
County of Nottingham (d)	Nottingham.
Counties of Leicester and Rutland	Leicester.
County of Lincoln (e)	Lincoln.
Counties of Salop and Montgomery	Shrewsbury.
Northern division of Northampton, and counties of Huntingdon and Cambridge (f).	Peterborough.
County of Norfolk (g)	Norwich.
Eastern division of the county of Suffolk and north division of the county of Essex.	Ipswich.
Western division of the county of Suffolk ..	Bury St. Edmunds.
County of Bedford and southern division of Northamptonshire (h).	Northampton.
County of Warwick (i)	Birmingham.
County of Stafford (k)	Lichfield.
Counties of Radnor, Brecknock and Hereford ..	Hereford.
Counties of Cardigan, Carmarthen (l) and Pembroke (m), with the deaneries of East and West Gower, in the county of Glamorgan.	Carmarthen.

(a) Including the towns and counties of Newcastle-on-Tyne and Berwick-upon-Tweed.

(b) Including the town and county of Kingston-on-Hull.

(c) Including the city of Chester.

(d) Including the town of Nottingham.

(e) Including the city of Lincoln.

(f) Including the University of Cambridge.

(g) Including the city of Norwich.

(h) Including the town of Northampton.

(i) Including the city of Coventry.

(k) Including the city of Lichfield.

(l) Including the town of Carmarthen.

(m) Including the town of Haverfordwest.

C. P. A. 1857.

Districts.	Places of District Registries.
Counties of Glamorgan (with the exception of the deaneries of East and West Gower), and Monmouth.	Llandaff.
County of Worcester (<i>n</i>)	Worcester.
County of Gloucester (<i>o</i>), except the present Bristol County Court district.	Gloucester.
Bristol and Bath present County Court districts ..	Bristol.
Counties of Oxford (<i>p</i>), Berks, Bucks	Oxford.
Eastern division of the county of Somerset, except the present Bath County Court district, and the part in Somersetshire of the present Bristol County Court district.	Wells.
Western division of the county of Somerset ..	Taunton.
County of Devon (<i>q</i>)	Exeter.
County of Cornwall	Bodmin.
County of Wilts	Salisbury.
County of Dorset (<i>r</i>)	Blandford.
County of Hants (<i>s</i>)	Winchester.
Eastern division of the county of Sussex (<i>t</i>) ..	Lewes.
Western division of the county of Sussex ..	Chichester.
East division of the county of Kent (<i>u</i>) ..	Canterbury.

The divisions of counties referred to in the schedule are the divisions of the same counties described for election purposes in the act of the second and third years of King William the Fourth, chapter sixty-four; and the cities and towns herein referred to are to be taken to include the counties of such cities and towns as are counties of themselves.

- (*n*) Including the city of Worcester.
(*o*) Including the city of Gloucester.
(*p*) Including the University of Oxford.
(*q*) Including the city of Exeter.
(*r*) Including the town of Poole.
(*s*) Including the town of Southampton and Isle of Wight.
(*t*) Including such of the Cinque Ports and their dependencies as are locally situate in the county of Sussex.
(*u*) Including the city of Canterbury and such of the Cinque Ports and their dependencies as are locally situate in the county of Kent.

SCHEDULE (B).

	Annual Salary.
The Three Registrars in London, each ..	£1,500
The Record Keepers, each	600
The Sealer	300

21 & 22 VICT. c. 95 (C. P. A. 1858).

C. P. A. 1858. *An Act to amend the Act of the Twentieth and Twenty-first Victoria, Chapter Seventy-seven.*

[2nd August, 1858.]

20 & 21 Vict.
c. 77.

WHEREAS in the last session of parliament an act was passed, intituled "An Act to amend the Law relating to Probates and Letters of Administration in England," hereinafter designated "The Court of Probate Act:" and whereas it is expedient to amend the same: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

The judge of the High Court of Admiralty and the judge of the Court of Probate may sit for each other.

1. It shall be lawful for the judge of the High Court of Admiralty to sit in open court or in chambers for the judge of her Majesty's Court of Probate, and it shall be lawful for the judge of her Majesty's Court of Probate to sit in open court or in chambers for the judge of the High Court of Admiralty; and all orders, decrees or sentences, and other acts whatsoever, made, decreed, pronounced or done by either of the judges aforesaid acting for the other shall, in the court books, be stated to have been made, decreed, pronounced or done by such judge sitting and acting on behalf of such other judge; and such orders, decrees, sentences and other acts so made, decreed, pronounced or done shall have the same force and validity in law as if they had been made, decreed, pronounced or done by the judge on whose behalf they purport to have been so made, decreed, pronounced or done.

Serjeants and barristers may practise in Court of Probate.

2. All serjeants and barristers-at-law shall be entitled from and after the passing of this act to practise in all causes and matters whatsoever in the Court of Probate.

The judge of the Court of Probate may sit in chambers.

3. It shall be lawful for the judge of the Court of Probate for the time being to sit in chambers for the despatch of such part of the business of the said court as can in the opinion of the said judge, with advantage to the suitors, be heard in chambers: and the times at which such sittings shall be held shall from time to time be fixed by the judge: provided always, that no question shall be heard in chambers which either party shall require to be heard in open court.

The treasury to cause chambers to be provided.

4. The commissioners of her majesty's treasury shall from time to time provide chambers in which the judge of the Court of Probate shall sit for the despatch of such business as aforesaid; and until such chambers are provided elsewhere the said judge shall sit in chambers in any room which he may find convenient for the purpose.

Powers of

5. The judge of the Court of Probate, when so sitting in

chambers, shall have and exercise the same power and jurisdiction in respect of the business to be brought before him as if sitting in open court.

6. Whereas there are now three registrars only of the principal registry of the said court, that is to say, Augustus Frederic Bayford, the senior registrar; Charles John Middleton, the second registrar; and Edward Francis Jenner, the third registrar: and whereas the duties of the said principal registry cannot be efficiently discharged by three registrars: be it enacted, that it shall be lawful for the judge of the said court to appoint a fourth registrar for the principal registry of the said court, in addition to the three registrars appointed under "The Court of Probate Act;" and from and after the appointment of such fourth registrar there shall be paid to each of the said registrars the annual salary mentioned in the schedule to this act, in lieu of the salary provided by "The Court of Probate Act," such salaries to be paid out of any monies provided by parliament for the purposes of the said act: provided always, that nothing herein contained shall be construed to diminish the salary of any of the three registrars appointed before the passing of this act.

7. On the death, resignation or removal of any of the four registrars of the said principal registry, other than the junior registrar for the time being, the vacancy thereby occasioned shall be filled up by the registrar next in seniority to whom no sufficient objection shall be made to the satisfaction of the judge of the said court.

8. Clerks having served five years in the principal registry of the Court of Probate shall be eligible to be appointed registrars or district registrars of the said court.

9. It shall be lawful for the judge of the Court of Probate to admit any person who at the time of the passing of "The Court of Probate Act" was articled to a proctor in Doctors' Commons, or to a proctor belonging to any ecclesiastical court, so soon as he shall have served the full term for which he was articled or within the period of one year therefrom, to be a proctor of her majesty's Court of Probate, upon the payment of such fees as shall be fixed by the judge of the said court with the sanction of the commissioners of her majesty's treasury.

10. Where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for had at the time of his death his fixed place of abode in one of the districts specified in schedule (A) to the said "Court of Probate Act," and that the personal estate in respect of which such probate or letters of administration are to be or have been granted,

C. P. A. 1858.

judge when sitting in chambers.

Power to appoint an additional registrar.

Vacancy in office of registrar, how to be filled up.

Clerks in the principal registry eligible to be registrars, &c. Certain articled clerks to be admitted proctors of the Court of Probate.

Where personalty is under 200*l.* county court to have jurisdiction.

C. P. A. 1858. exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of two hundred pounds, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of three hundred pounds or upwards, the judge of the county court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto.

Sect. 54 of
20 & 21 Vict.
c. 77, repealed.

Sect. 59 of
20 & 21 Vict.
c. 77, to apply
to applica-
tions for
revocation of
grants.

Power to
make rules
and orders and
frame scales of
fees for the
county courts.

Non-contentious business
pending in
any ecclesiastical court to
be transferred.

Bonds given
before Jan. 11,
1858, to re-
main in force.

11. Section fifty-four of the said "Court of Probate Act" shall be and the same is hereby repealed.

12. The said "Court of Probate Act," section fifty-nine, shall, so far as the county courts or a judge thereof are concerned, apply to an application for the revocation of a grant of probate or administration as well as to an application for any such grant.

13. The power and authority to make rules and orders for regulating the proceedings of the county court shall extend and be applicable to all proceedings in the county courts under this act, and also to framing a scale of costs and charges to be paid to counsel, proctors, solicitors and attornies, in respect of proceedings in county courts, under the said "Court of Probate Act" or this act.

14. All non-contentious business pending in any ecclesiastical court at the time when "The Court of Probate Act" came into operation shall be deemed to have been transferred to the Court of Probate, in the same way as all pending suits were transferred to the said court under the said act, and all acts executed under the authority of any such ecclesiastical court with reference to such business which would have been valid if the authority of such court had not been abolished shall be valid, and all oaths and bonds sworn and executed in manner required by any such ecclesiastical court in reference to such business, prior to the eleventh day of January, one thousand eight hundred and fifty-eight, shall continue to have and be deemed to have had the same force and effect in law as they would have had if sworn and executed in pursuance of the provisions of the said act or of this act.

15. Bonds given to any archbishop, bishop or other person exercising testamentary jurisdiction in respect of grants of letters of administration made prior to the eleventh day of January, one thousand eight hundred and fifty-eight, or in respect of grants made in pursuance of "The Court of

Probate Act" or of this act, whether taken under a commission or requisition executed before or after the said eleventh day of January, shall enure to the benefit of the judge of the Court of Probate, and, if necessary, shall be put in force in the same manner and subject to the same rules (so far as the same may be applicable to them) as if they had been given to the judge of the said court subsequently to that day. C. P. A. 1858.

16. Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor. An executor not acting or not appearing to a citation to be treated as if he had renounced.

17. The judge of the Court of Probate shall have and exercise the same power of altering and amending grants of probate and letters of administration made before the eleventh day of January, one thousand eight hundred and fifty-eight, as any ecclesiastical court had and exercised in respect of such grants. Judge of the Court of Probate may amend grants made before Jan. 11, 1858.

18. The provisions of an act passed in the thirty-eighth year of George the third, chapter eighty-seven, and of "The Court of Probate Act," shall be extended to all executors and administrators residing out of the jurisdiction of her majesty's courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to the passing of the last-mentioned act, and it shall be lawful to alter the language of the grant prescribed by the first-named statute so as to make it apply to grants made in the Court of Probate under the said last-mentioned act. Provisions of 38 Geo. 3, c. 87, and 20 & 21 Vict. c. 77, extended to all cases of executors and administrators.

19. From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary. Between the death of the person deceased and the grant the property to vest in the judge ordinary.

20. All second and subsequent grants of probate or letters of administration shall be made in the principal registry, or in the district registry where the original will is registered, or the original grant of letters of administration has been made, or in the district registry to which the original will or a registered copy thereof, or the record of the original grant of administration, have been transmitted, by virtue of a requisition issued in pursuance of section eighty-nine of "The Court of Second and subsequent grants to be made where the original will or the original letters of administration are deposited.

C. P. A. 1858. Probate Act;" and for and in respect of such second or subsequent grants of probate, or letters of administration, to be made in a district registry, it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made.

The Court of Probate may require security from a receiver of real estate.

21. It shall be lawful for the Court of Probate to require security by bond, in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said court, under section seventy-one of "The Court of Probate Act;" and the court may, on application made on motion or in a summary way, order one of the registrars of the court to assign the same to some person to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security, or put the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof.

Administration pending suit deemed to apply to appeals.

22. All the provisions contained in "The Court of Probate Act," respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the house of lords under the said act.

Registrar may issue subpœnas to produce papers, &c.

23. It shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said court, to issue a subpœna requiring any person to produce and bring into the principal or any district registry, or otherwise as in the said subpœna may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power or under the control of such person; and such person, upon being duly served with the said subpœna, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing.

The registrars to do all acts heretofore done by surrogates.

24. The registrars of the principal registry shall be invested with and shall and may exercise with reference to proceedings in the Court of Probate the same power and authority which surrogates of the judge of the Prerogative Court of Canterbury could or might before the passing of "The Court of Probate Act" have exercised in chambers with reference to proceedings in the said prerogative court.

Copies of wills

25. Copies of wills required to be transmitted by a dis-

strict registrar, and certified by him to be correct copies, under section fifty-one of "The Court of Probate Act," may be so certified and transmitted under a stamp provided by the district registrar for that purpose, and approved of by the judge of the Court of Probate.

C. P. A. 1858.

may be certified by a stamp.

26. Certificates issued from the principal registry with reference to notices of applications transmitted from the district registrars under section forty-nine of "The Court of Probate Act" need not be made under the hand of a registrar of the principal registry, as required by the said act, but may be issued under a stamp provided for that purpose, and approved of by the judge of the Court of Probate.

Certificates from the principal registry may be stamped.

27. Whereas doubts have been entertained whether a requisition can be issued under section eighty-nine of "The Court of Probate Act" for the transmission of one or more papers only, not being all the papers and documents in the custody of the person to whom any such requisition may be addressed: be it therefore enacted and declared, that the said section shall be construed to extend to all requisitions, whether for the transmission of one or of more records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, or other instruments relating exclusively or principally to matters and causes testamentary.

Requisitions may be issued for the transmission of a single paper.

28. The judge of the Court of Probate, and the registrars of the principal registry thereof, shall respectively, in any case where an ecclesiastical or other court having testamentary jurisdiction had previously to the eleventh day of January, one thousand eight hundred and fifty-eight, made any order or decree in respect of costs, have the same power of taxing such costs, and enforcing payment thereof, or of otherwise carrying such order or decree into effect, as if the cause wherein such decree was made had been originally commenced and prosecuted in the said Court of Probate: provided that in taxing any such costs, or any other costs incurred in causes depending in any such courts before the time aforesaid, all fees, charges and expenses shall be allowed which might have been legally made, charged and enforced according to the practice of the Prerogative Court of Canterbury.

Power to enforce decree as to costs.

29. Letters of administration granted by the Court of Probate in Ireland shall not be re-sealed, under section ninety-five of the twentieth and twenty-first Victoria, chapter seventy-nine, until a certificate has been filed under the hand of a registrar of the Court of Probate in Ireland that bond has been given to the judge of the Court of Probate in Ireland in a sum sufficient in amount to cover the property in England as well as in Ireland in respect of which such administration is required to be re-sealed.

Letters of administration granted in Ireland not to be re-sealed in England until sufficient bond is given.

C. P. A. 1858.

Commissioners may be appointed in the Isle of Man, &c.

30. It shall be lawful for the judge of the Court of Probate to appoint, by commission under seal of the court, any persons practising as solicitors in the Isle of Man, in the Channel Islands, or any of them, to administer oaths, and to take declarations or affirmations, and to exercise any other powers which can be exercised by commissioners of her majesty's Court of Probate; and such persons shall be entitled from time to time to charge and take such fees as any other persons performing the same duties in the Court of Probate may charge and take.

Affidavits, before whom to be sworn when parties making them reside in foreign parts.

31. In cases where it is necessary to obtain affidavits, declarations or affirmations to be used in the Court of Probate from persons residing in foreign parts out of her majesty's dominions, the same may be sworn, declared or affirmed before the persons empowered to administer oaths under the act of the sixth of George the fourth, chapter eighty-seven, or under the act of the eighteenth and nineteenth of Victoria, chapter forty-two; provided that, in places where there are no such persons as are mentioned in the said acts, such affidavits, declarations or affirmations may be made, declared and affirmed before any foreign local magistrate or other person having authority to administer an oath.

Affidavits, before whom to be sworn.

32. Affidavits, declarations and affirmations to be used in the Court of Probate may be sworn and taken in Scotland, Ireland, the Isle of Man, the Channel Islands, or any colony, island, plantation or place out of England under the dominion of her majesty, before any court, judge, notary public or person lawfully authorized to administer oaths in such country, colony, island, plantation or place respectively, or, so far as relates to the Isle of Man and the Channel Islands, before any commissary, ecclesiastical judge or surrogate, who, at the time of the passing of "The Court of Probate Act," was authorized to administer oaths in the Isle of Man or in the Channel Islands respectively, and all registrars and other officers of the Court of Probate shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public or person, which shall be attached, suspended or subscribed to any such affidavit, declaration or affirmation, or to any other document.

Persons forging seal or signature guilty of felony.

33. If any person shall forge any such seal or signature as last aforesaid, or any seal or signature impressed, affixed or subscribed, under the provisions of the said act of the sixth of George the fourth, or of the said act of the eighteenth and nineteenth Victoria, to any affidavit, declaration or affirmation to be used in the Court of Probate, or shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony,

and shall upon conviction be liable to penal servitude for the term of his life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years nor less than one year; and whenever any such document has been admitted in evidence by virtue of this act, the court or the person who has admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, for such period and subject to such conditions as to the said court or person shall seem meet; and every person charged with committing any felony under this act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he may be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.

34. Any person who shall wilfully give false evidence, or who shall wilfully swear, affirm, or declare falsely, in any affidavit or deposition before any surrogate having authority to administer oaths under "The Court of Probate Act," or before any person who before the passing of the said act was a surrogate authorized to administer oaths in any of the Channel Islands, or before any person authorized to administer oaths under this act, shall be liable to the penalties and consequences of wilful and corrupt perjury.

Persons taking a false oath before a surrogate guilty of perjury.

35. In case any officer appointed or to be appointed by virtue of "The Court of Probate Act, 1857," or of this act, shall, by reason of ill-health or other infirmity, become temporarily incapable of performing the duties of his office, it shall be lawful for the judge to appoint some other fit and proper person to discharge the duties of such office for any period not exceeding six calendar months at any one time, and the person so appointed shall, during such period, have all the power and authority of the officer in whose place he shall be so appointed, and shall be paid by such officer such sum by way of salary or allowance as shall be agreed upon between them respectively or be fixed by the judge, and the judge may, at his discretion, give leave of absence to any officer of the court for any period not exceeding two months in any year, and shall have the like power of making provision for the discharge of the duties of the office during such absence.

Provision for the necessary absence of officers.

36. The judge of the Court of Probate shall have and exer-

The judge to

C. P. A. 1858. have the same powers over practitioners as judges of other courts. Provision for expenses of indexing, &c. documents required to be removed under requisition.

cise, over proctors, solicitors, and attornies practising in the said court, the like authority and control as is now exercised by the judges of any court of equity or common law over persons practising therein as solicitors or attornies.

37. When any requisition shall issue in pursuance of section eighty-nine of "The Court of Probate Act, 1857," it shall be lawful for the commissioners of her majesty's treasury, out of such monies as may be provided and appropriated by parliament for that purpose, to cause to be paid all such expenses attending the arranging, classification, indexing, carriage, or otherwise connected with the removal of the documents or books required by such requisition to be removed, as the judge shall from time to time certify to the said commissioners to be proper and necessary.

Short title of act.

38. In citing the act of the twentieth and twenty-first Victoria, chapter seventy-seven, in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Court of Probate Act, 1857," and in citing this act, the expression "Court of Probate Act, 1858."

SCHEDULE.

Senior Registrar	..	..	..	£1,600
Second	..	..	..	1,400
Third	..	..	..	1,200
Fourth	..	..	..	1,000

21 & 22 VICT. c. 56.

21 & 22 Vict. c. 56. *An Act to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all parts of the United Kingdom the Effect of such Confirmation, and of Grants of Probate and Administration.*

[23rd July, 1858.]

WHEREAS it is expedient to amend the law relating to the confirmation of executors in Scotland, and to extend over the United Kingdom the effect of such confirmation, and of grants of probate and administration: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Practice of

1. From and after the twelfth day of November, one thou-

sand eight hundred and fifty-eight, the practice of raising edicts of executry before the commissary courts in Scotland, for the decerniture of executors to deceased persons, shall cease, and it shall not be competent to any person to obtain himself decerned executor in virtue of any such edict raised subsequently to the date aforesaid.

21 & 22 Vict.
c. 56.
raising edicts
of executry to
cease.

2. From and after the date aforesaid every person desirous of being decerned executor of a deceased person as disponent, next of kin, creditor, or in any other character whatsoever now competent, or of having some other person, possessed of such character, decerned executor to a deceased person, shall, instead of applying, as heretofore, for an edict of executry from the commissary, present a petition to the commissary for the appointment of an executor, which petition shall be in the form as nearly as may be of the Schedule (A.) hereunto annexed, and shall be subscribed by the petitioner or by his agent.

Petition to
commissary to
be substituted.

Form of petition
as in
Schedule (A.).

3. Such petition shall be presented to the commissary of the county wherein the deceased died domiciled, and in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, having personal or moveable property in Scotland, to the commissary of Edinburgh.

To whom
petition to be
presented.

4. Every such petition, in place of being published at the kirk door and market cross, as edicts of executry have been in use to be published, shall be intimated by the commissary clerk affixing on the door of the commissary court house, or in some conspicuous place of the court and of the office of the commissary clerk, in such manner as the commissary may direct, a full copy of the petition, and by the keeper of the record of edictal citations at Edinburgh inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the keeper of the record of edictal citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general and special services, in the form of Schedule (B.) hereunto annexed; provided always, that to enable the keeper of the record of edictal citations to make such publication, the commissary clerk shall transmit to him the said particulars, and to enable the commissary clerk to grant the certificate after mentioned, the keeper of the record of edictal citations shall transmit to the commissary clerk a copy, certified by the said keeper, of the printed and published particulars, all in such form and manner and on payment of such fees as the court of session by act of sederunt may direct.

Mode of intimating
petition.

5. The commissary clerk, after receiving the certified copy of the printed and published particulars, shall forthwith certify

Certificate of
intimation of
petition.

- 21 & 22 Vict.
c. 56.
- Additional
intimation of
petition in
certain cases.
- Procedure on
petition.
- Decree dative.
- Proviso as to
caution.
- Not to affect
present pro-
cedure.
- Where inven-
tories, &c.
may be re-
corded.
- Confirmations
may be
granted.
- Inventory
may include
personal
estate in any
part of
United King-
dom.
- Form and
effect of con-
firmations.
- on the petition that the same has been intimated and published, in terms of the provisions of this act, in the form of Schedule (C.) hereunto annexed, and such certificate shall be sufficient evidence of the facts therein set forth: provided always, that where a second petition for confirmation is presented in reference to the same personal estate, the commissary shall direct intimation of such petition to be made to the party who presented the first petition.
6. On the expiration of nine days after the commissary clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in court, and an executor decerned, or other procedure may take place, according to the forms now in use in case of edicts of executry, and with the like force and effect; and decree dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner: provided always, that nothing herein contained shall alter or affect the law as to executors finding caution; and that bonds of caution for executors may be partly printed and partly written.
7. Provided always, that nothing hereinbefore contained shall alter or affect the course of procedure now in use before the commissaries in confirmations of executors nominate.
8. Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any commissary court to which it is competent to apply in virtue of the provisions of this act for the appointment of an executor dative to the deceased.
9. From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or both: provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: provided also, that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.
10. Confirmations shall be in the form, or as nearly as may be in the form, of Schedules (D.) and (E.) hereunto annexed; and such confirmations shall have the same force and effect with the like writs framed in terms of the acts of sederunt

passed on the twentieth December, one thousand eight hundred and twenty-three, and the twenty-fifth February, one thousand eight hundred and twenty-four, or at present in use.

21 & 22 Vict.
c. 56.

11. Oaths and affirmations on inventories of personal estates given up to be recorded in any commissary court may be taken either before the commissary or his depute, or the commissary clerk or his depute, or before any commissioner appointed by the commissary, or before any magistrate or justice of the peace within the United Kingdom or the colonies, or any British consul.

Oaths, before
whom to be
taken.

12. From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal court of probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said court of probate.

Confirmation
produced in
Probate
Court of Eng-
land and
sealed, to
have the
effect of pro-
bate or ad-
ministration.

13. From and after the date aforesaid, where any confirmation of the executor of a person who shall so be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in Ireland, shall be produced in the court of probate in Dublin, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in Ireland as if a probate or letters of administration, as the case may be, had been granted by the said court of probate in Dublin.

Confirmation
produced in
Probate Court
of Dublin,
and sealed, to
have the
effect of
probate or
administra-
tion.

14. From and after the date aforesaid, when any probate or letters of administration to be granted by the court of probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the court of probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the commissary court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said

Probate or
letters of ad-
ministration
produced in
commissary
court and cer-
tified, to have
effect of con-
firmation.

21 & 22 Vict.
c. 56. court; the commissary clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the Schedule (F.) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect and have the same operation in Scotland as if a confirmation had been granted by the said court.

For securing the stamp duties, probates, &c. to be deemed granted for all the property in the United Kingdom.

Inventory to include all such property.

15. In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the act of parliament passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, and of all other Acts of Parliament granting or relating to stamp duties on probates and letters of administration in England and Ireland respectively; and the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased; and also where the commissary shall in manner aforesaid find that the deceased was domiciled in Scotland, the inventory required by law to be exhibited and recorded in the proper commissary court in Scotland before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in Scotland, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland.

Provisions of former acts to apply to the probates, letters of administration, and inventories mentioned in this act.

16. For the purpose aforesaid, and also for granting relief where too high a stamp duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the said act passed in the fifty-fifth year of his Majesty King George the Third relating to probates and letters of administration granted in England, and the like provisions

in the act passed in the fifty-sixth year of the said king, chapter fifty-six, relating to probates and letters of administration granted in Ireland, and the provisions contained in the act passed in the forty-eighth year of the said king, chapter one hundred and forty-nine, relating to inventories in Scotland, and also all other provisions contained in the said acts respectively, or in any other act or acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration, to which effect is given by this act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

21 & 22 Vict.
c. 56.

17. Provided, that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in England or in Ireland, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorize the same to be so stated in or upon the probate or letters of administration: provided also, that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in Scotland, shall be evidence, and have effect for the purposes of this act only.

Affidavit as to domicile to be made on applying for probate or administration.

18. It shall be competent to the court of session, and they are hereby authorized and required from time to time, to pass such acts of sederunt as shall be necessary and proper for regulating in all respects the proceedings under this act before the commissary of Edinburgh and other commissaries in Scotland, and following out the purposes of this act, and also the fees to be paid to agents before the said courts, and to the commissary clerks and other officers of court, and the expense of publication of petitions.

Acts of sederunt to be passed for following out purposes of this act.

19. All former acts, and acts of sederunt made in virtue thereof, so far as inconsistent with the present act, are hereby repealed; and this act may be amended or repealed by any act to be passed during the present session of parliament, and may be cited as the "Confirmation and Probate Act, 1858."

Former acts of sederunt repealed if inconsistent with this act.

20. The word "commissary" shall include commissary depute, and the term "commissary clerk" shall include commissary clerk depute.

Interpretation of terms.

21 & 22 Vict.
c. 56.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A.)

Form of a Petition for Appointment of an Executor to a deceased Person.

Unto the honourable the commissary of [*specify the county*], the petitioner of A. B. [*here name and design the petitioner*];

Humbly sheweth,

That the late C. D. [*here name and design the deceased person to whom an executor is sought to be appointed*] died at [*specify place*] on or about the [*specify date*], and had at the time of his death his ordinary or principal domicile in the county of [*specify county* or "furth of Scotland," or "without any fixed domicile," or "without any known domicile," as the case may be.]

That the petitioner is the only son and next of kin [*or state what other relationship, character, or title the petitioner has, giving him right to apply for the appointment of executor*].

May it therefore please your Lordship to decern the petitioner executor dative quā next of kin to the said C. D. [*or state the other character in which the petitioner claims to be appointed executor*].

According to justice, &c.

[*Signed by the petitioner or his agent.*]

SCHEDULE (B.)

Roll of Petitions for the Appointment of Executors in Commissary Courts in Scotland.

County.	Name and Designation of Petitioner.	Title of Petitioner.	Name and Designation of Defunct.	Place and Date of Death.
Edinburgh.	A. B., Writer in Edinburgh.	Next of Kin.	C. D., Merchant in Edinburgh.	No.—, George St., Edinburgh 1st January, 1867.

SCHEDULE (C.)

Form of Certificate by Commissary Clerk of Publication of a Petition for the Appointment of an Executor.

I, A. B., commissary clerk [*or "commissary clerk depute," as the case may be*], of the county of [*specify county*], hereby certify that this petition was intimated by affixing a copy thereof on the door of the court-house [*if some other place has been directed by the commissary specify it*], on the [*specify date*], and by being published by the keeper of the record of edictal citations at Edinburgh, in the printed roll of petitions for the appointment of executors in the Commissary Courts of Scotland, printed and published on [*specify date*].

A. B.

SCHEDULE (D.)

Form of a Testament Dative or Confirmation of the Executor of a Person who has died without naming one.

I, A. B., commissary of the county of [*specify county*], considering that by my decree, dated [*specify date*], I decerned C. D. executor dative quā

next of kin [or other character, as the case may be], of the late E. F. who died at [specify place], on [specify date], and seeing that the said C. D. has since given up on oath an inventory of the personal estate and effects of the said E. F. at the time of his death situated in Scotland [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, as the case may be], amounting in value to pounds, which inventory has been recorded in my Court books of date [specify date], and that he has likewise found caution for his acts and intromissions as executor: therefore I, in her Majesty's name and authority, make, constitute, ordain and confirm the said C. D. executor dative quà [specify character] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor dative quà [specify character] is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

21 & 22 Vict.
c. 56.

Given under the seal of office of the commissariat of [specify county], and signed by the clerk of Court at [specify place], the [specify date].

To be signed by the commissary clerk or his depute, and sealed with the seal of office.

SCHEDULE (E.)

Form of a Testament Testamentar or Confirmation of an Executor Nominate.

I, A. B., commissary of the county of [specify county], considering that the late C. D. died at [specify place], upon [specify date], and that by his last will [or other writing containing the nomination of executor], dated [specify date], and recorded in my Court books upon [specify date], the said C. D. nominated and appointed E. F. to be his executor, and that the said E. F. has given up on oath an inventory of the personal estate and effects of the said C. D. at the time of his death situated in Scotland [or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the case may be], amounting in value to pounds, which inventory has likewise been recorded in my Court books of date [specify date]: therefore I, in her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the aforesaid last will [or other writing containing the nomination of executor]; and I give and commit to the said E. F. full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor nominate is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariat of [specify county], and signed by the clerk of Court at [specify place], the [specify date].

To be signed by the commissary clerk or his depute, and sealed with the seal of office.

SCHEDULE (F.)

I, A. B., commissary clerk [or commissary clerk depute] of the county of Edinburgh, hereby certify that this grant of probate has [or these letters of administration have] been produced in the Commissary Court of the said county, and that a copy thereof has been deposited with me.

22 VICT. c. 30.

22 Vict. c. 30. *An Act to amend the Confirmation and Probate Act, 1858.*
[19th April, 1859.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Persons, &c.
making pay-
ments upon
confirmations
and probates
under Act,
1858, to be
indemnified.

1. All persons and corporations who, in reliance upon any instrument purporting to be a confirmation granted under "The Confirmation and Probate Act, 1858," and all persons and corporations who, in reliance upon any such instrument which may be sealed under the authority of the said act with the seal of the Principal Court of Probate in England or of the Court of Probate in Dublin, and all persons or corporations who, in reliance upon any instrument purporting to be a probate or letters of administration granted by the Court of Probate in England or Court of Probate in Dublin, and having endorsed or written thereon a certificate by the commissary clerk of Edinburgh, in the form in the said Confirmation and Probate Act prescribed, shall have made or permitted to be made, or shall make or permit to be made, any payment or transfer *bonâ fide* upon any such confirmation, probate or letters of administration, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such confirmation, probate or letters of administration.

Short title.

2. This act may be cited as "The Confirmation and Probate Amendment Act, 1859."

24 & 25 VICT. c. 114.

24 & 25 Vict.
c. 114. *An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.* [6th August, 1861.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Wills made
out of the
kingdom to
be admitted if
made accord-
ing to the law
of the place
where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland

to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin. 24 & 25 Vict. c. 114.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. Wills made in the kingdom to be admitted if made according to local usage.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same. Change of domicile not to invalidate will.

4. Nothing in this act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act. Nothing in this act to invalidate wills otherwise made.

5. This act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act. Extent of act.

24 & 25 VICT. c. 121.

An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within her Majesty's Dominions. 24 & 25 Vict. c. 121.
[6th August, 1861.]

WHEREAS by reason of the present law of domicile the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Whenever her Majesty shall by convention with any No British

24 & 25 Vict.
c. 121.

subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.

Who this act shall not apply to.

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates,

foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the London Gazette no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's secretary of state for the home department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland, or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

3. This act shall not apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person pre-

sent at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit.

24 & 25 Vict.
c. 121.

the consuls of
such foreign
states may
administer.

33 VICT. c. 14.

An Act to amend the Law relating to the Legal Condition of Aliens and British Subjects. [12th May, 1870.] 33 Vict. c. 14.

WHEREAS it is expedient to amend the law relating to the legal condition of aliens and British subjects: Be it enacted as follows:

1. This act may be cited for all purposes as "The Naturalization Act, 1870." Short title.

Status of Aliens in the United Kingdom.

2. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided—

Capacity of an
alien as to
property.

(1.) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise:

(2.) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him:

(3.) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any

33 Vict. c. 14.

Power of
naturalized
aliens to
divest them-
selves of their
status in
certain cases.

disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act.

2. Where her majesty has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it shall be lawful for her majesty, by order in council, to declare that such convention has been entered into by her majesty; and from and after the date of such order in council, any person being originally a subject or citizen of the state referred to in such order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person shall be regarded as an alien, and as a subject of the state to which he originally belonged as aforesaid.

A declaration of alienage may be made as follows; that is to say,—If the declarant be in the united kingdom, in the presence of any justice of the peace; if elsewhere in her majesty's dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of her majesty's dominions, in the presence of any officer in the diplomatic or consular service of her majesty.

How British-
born subject
may cease to
be such.

4. Any person who by reason of his having been born within the dominions of her majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of her majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

Alien not en-
titled to jury
de medietate
linguæ.

5. From and after the passing of this act, an alien shall not be entitled to be tried by a jury de medietate linguæ, but shall be triable in the same manner as if he were a natural-born subject.

Expatriation.

Capacity of
British sub-

6. Any British subject who has at any time before, or may at any time after the passing of this act, when in any foreign

state and not under any disability voluntarily become naturalized in such state, shall, from and after the time of his so having become naturalized in such foreign state be deemed to have ceased to be a British subject and be regarded as an alien: Provided,—

33 Vict. c. 14.

ject to renounce allegiance to her majesty.

- (1.) That where any British subject has before the passing of this act voluntarily become naturalized in a foreign state and yet is desirous of remaining a British subject, he may, at any time within two years after the passing of this act, make a declaration that he is desirous of remaining a British subject, and upon such declaration hereinafter referred to as a declaration of British nationality being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject; with this qualification, that he shall not, when within the limits of the foreign state in which he has been naturalized, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect:
- (2.) A declaration of British nationality may be made, and the oath of allegiance be taken as follows; that is to say,—if the declarant be in the united kingdom, in the presence of a justice of the peace; if elsewhere in her majesty's dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of her majesty's dominions, in the presence of any officer in the diplomatic or consular service of her majesty.

Naturalization and Resumption of British Nationality.

7. An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by one of her majesty's principal secretaries of state, either by general order or on any special occasion, has resided in the united kingdom for a term of not less than five years; or has been in the service of the crown for a term of not less than five years, and intends, when naturalized, either to reside in the united kingdom, or to serve under the crown, may apply to one of her majesty's principal secretaries of state for a certificate of naturalization.

Certificate of naturalization.

The applicant shall adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such secretary of state may require. The said secretary of state, if satisfied with the evidence adduced,

33 Vict. c. 14. shall take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate, as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance.

Political, &c.
rights of cer-
tified alien.

An alien to whom a certificate of naturalization is granted shall in the united kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the united kingdom, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

The said secretary of state may in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

An alien who has been naturalized previously to the passing of this act may apply to the secretary of state for a certificate of naturalization under this act, and it shall be lawful for the said secretary of state to grant such certificate to such naturalized alien upon the same terms and subject to the same conditions in and upon which such certificate might have been granted if such alien had not been previously naturalized in the united kingdom.

Certificate of
re-admission
to British
nationality.

8. A natural-born British subject who has become an alien in pursuance of this act and is in this act referred to as a statutory alien, may, on performing the same conditions and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality, apply to one of her majesty's principal secretaries of state for a certificate hereinafter referred to as a certificate of re-admission to British nationality, re-admitting him to the status of a British subject. The said secretary of state shall have the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance shall in like manner be required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted shall, from the date of

the certificate of re-admission, but not in respect of any previous transaction, resume his position as a British subject; with this qualification, that within the limits of the foreign state of which he became a subject he shall not be deemed to be a British subject unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect. 33 Vict. c. 14.

The jurisdiction by this act conferred on the secretary of state in the united kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession shall, in the case of such person, be deemed equivalent to residence in the united kingdom.

9. The oath in this act referred to as the oath of allegiance shall be in the form following; that is to say, Form of oath of allegiance.

"I do swear that I will be faithful and bear true allegiance to her majesty Queen Victoria, her heirs and successors, according to law. So help me God."

National Status of Married Women and Infant Children.

10. The following enactments shall be made with respect to the national status of women and children: National status of married women and infant children.

- (1.) A married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject:
- (2.) A widow being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of re-admission to British nationality in manner provided by this act:
- (3.) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject:
- (4.) Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother shall be deemed to have resumed the position of a British subject to all intents:

33 Vict. c. 14.

- (5.) Where the father, or the mother being a widow, has obtained a certificate of naturalization in the united kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the united kingdom shall be deemed to be a naturalized British subject.

Supplemental Provisions.

Regulations
as to regis-
tration.

11. One of her majesty's principal secretaries of state may by regulation provide for the following matters:—

- (1.) The form and registration of declarations of British nationality:
- (2.) The form and registration of certificates of naturalization in the united kingdom:
- (3.) The form and registration of certificates of re-admission to British nationality:
- (4.) The form and registration of declarations of alienage:
- (5.) The registration by officers in the diplomatic or consular service of her majesty of the births and deaths of British subjects who may be born or die out of her majesty's dominions, and of the marriages of persons married at any of her majesty's embassies or legations:
- (6.) The transmission to the united kingdom for the purpose of registration or safe keeping, or of being produced as evidence of any declarations or certificates made in pursuance of this act out of the united kingdom, or of any copies of such declarations or certificates, also of copies of entries contained in any register kept out of the united kingdom in pursuance of or for the purpose of carrying into effect the provisions of this act:
- (7.) With the consent of the treasury, the imposition and application of fees in respect of any registration authorized to be made by this act, and in respect of the making any declaration or the grant of any certificate authorized to be made or granted by this act:

The said secretary of state, by a further regulation, may repeal, alter, or add to any regulation previously made by him in pursuance of this section.

Any regulation made by the said secretary of state in pursuance of this section shall be deemed to be within the powers conferred by this act, and shall be of the same force as if it had been enacted in this act, but shall not so far as respects the imposition of fees be in force in any British possession, and shall not, so far as respects any other matter, be in force in any British possession in which any act or ordinance to the contrary of or inconsistent with any such direction may for the time being be in force.

12. The following regulations shall be made with respect to evidence under this act:—

33 Vict. c. 14.

Regulations
as to evidence.

(1.) Any declaration authorized to be made under this act may be proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy by one of her majesty's principal secretaries of state, or by any person authorized by regulations of one of her majesty's principal secretaries of state to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned:

(2.) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of her majesty's principal secretaries of state, or by any person authorized by regulations of one of her majesty's principal secretaries of state to give certified copies of such certificate:

(3.) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of her majesty's principal secretaries of state, or by any person authorized by regulations of one of her majesty's principal secretaries of state to give certified copies of such certificate:

(4.) Entries in any register authorized to be made in pursuance of this act shall be proved by such copies and certified in such manner as may be directed by one of her majesty's principal secretaries of state, and the copies of such entries shall be evidence of any matters by this act or by any regulation of the said secretary of state authorized to be inserted in the register:

(5.) "The Documentary Evidence Act, 1868," shall apply to any regulation made by a secretary of state, in pursuance of or for the purpose of carrying into effect any of the provisions of this act.

Miscellaneous.

13. Nothing in this act contained shall affect the grant of letters of denization by her majesty.

Saving of
letters of
denization.

14. Nothing in this act contained shall qualify an alien to be the owner of a British ship.

Saving as to
British ships.

15. Where any British subject has in pursuance of this act become an alien, he shall not thereby be discharged from any

Saving of
allegiance
prior to ex-
patriation.

33 Vict. c. 14. liability in respect of any acts done before the date of his so becoming an alien.

Power of colonies to legislate with respect to naturalization.

16. All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by her majesty in the same manner and subject to the same rules in and subject to which her majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession.

Definition of terms.

17. In this act, if not inconsistent with the context or subject-matter thereof,—

“Disability” shall mean the status of being an infant, lunatic, idiot, or married woman :

“British possession” shall mean any colony, plantation, island, territory, or settlement within her majesty’s dominions, and not within the united kingdom, and all territories and places under one legislature are deemed to be one British possession for the purposes of this act :

“The governor of any British possession” shall include any person exercising the chief authority in such possession :

“Officer in the diplomatic service of her majesty” shall mean any ambassador, minister, or chargé d’affaires, or secretary of legation, or any person appointed by such ambassador, minister, chargé d’affaires, or secretary of legation to execute any duties imposed by this act on an officer in the diplomatic service of her majesty :

“Officer in the consular service of her majesty” shall mean and include consul-general, consul, vice-consul, and consular agent, and any person for the time being discharging the duties of consul-general, consul, vice-consul, and consular agent.

Repeal of Acts mentioned in Schedule.

Repeal of acts.

18. The several acts set forth in the first and second parts of the schedule annexed hereto shall be wholly repealed, and the acts set forth in the third part of the said schedule shall be repealed to the extent therein mentioned ; provided that the repeal enacted in this act shall not affect—

(1.) Any right acquired or thing done before the passing of this act :

(2.) Any liability accruing before the passing of this act :

(3.) Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before the passing of this act :

- (4.) The institution of any investigation or legal proceeding or any other remedy for ascertaining or enforcing any such liability, penalty, forfeiture, or punishment as aforesaid. 33 Vict. c. 14.

SCHEDULE.

NOTE.—Reference is made to the repeal of the “whole act” where portions have been repealed before, in order to preclude henceforth the necessity of looking back to previous acts.

This schedule, so far as respects acts prior to the reign of George the second, other than acts of the Irish parliament, refers to the edition prepared under the direction of the Record Commission, intituled “The Statutes of the Realm; printed by command of his Majesty King George the third, in pursuance of an Address of the House of Commons of Great Britain. From original Records and authentic Manuscripts.”

PART I.

ACTS WHOLLY REPEALED OTHER THAN ACTS OF THE IRISH PARLIAMENT.

Date.	Title.
7 Jas. 1, c. 2	An act that all such as are to be naturalized or restored in blood shall first receive the Sacrament of the Lord's Supper, and the oath of allegiance, and the oath of supremacy.
11 Will. 3, c. 6* ..	An act to enable his Majesty's natural-born subjects
*11 & 12 Will. 3. (Ruff.)	to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens.
13 Geo. 2, c. 7 ..	An act for naturalizing such foreign Protestants and others therein mentioned, as are settled or shall settle in any of his Majesty's Colonies in America.
20 Geo. 2, c. 44 ..	An act to extend the provisions of an act made in the thirteenth year of his present Majesty's reign, intituled “An act for naturalizing foreign Protestants and others therein mentioned, as are settled or shall settle in any of his Majesty's Colonies in America, to other foreign Protestants who conscientiously scruple the taking of an Oath.”
13 Geo. 3, c. 25 ..	An act to explain two acts of parliament, one of the thirteenth year of the reign of his late Majesty, “for naturalizing such foreign Protestants and others, as are settled or shall settle in any of his Majesty's Colonies in America;” and the other of the second year of the reign of his present Majesty, “for naturalizing such foreign Protestants as have served or shall serve as Officers or Soldiers in his Majesty's Royal American Regiment, or as Engineers in America.”
14 Geo. 3, c. 84 ..	An act to prevent certain inconveniences that may happen by bills of naturalization.
16 Geo. 3, c. 52 ..	An act to declare his Majesty's natural-born subjects inheritable to the estates of their ancestors, whether lineal or collateral, in that part of Great Britain called Scotland, notwithstanding their father or mother were aliens.

33 Vict. c. 14.	Date.	Title.
6 Geo. 4, c. 67	..	An act to alter and amend an act passed in the seventh year of the reign of his Majesty King James the first, intituled "An Act that all such as are to be Naturalized or Restored in Blood shall first receive the Sacrament of the Lord's Supper and the Oath of Allegiance and the Oath of Supremacy."
7 & 8 Vict. c. 66	..	An act to amend the laws relating to aliens.
10 & 11 Vict. c. 83	..	An act for the naturalization of aliens.

PART II.

[ACTS OF THE IRISH PARLIAMENT WHOLLY REPEALED.]

PART III.

ACTS PARTIALLY REPEALED.

		Extent of repeal.
4 Geo. 1, c. 9....	An act for reviving, continuing, (Act of Irish and amending several statutes Parliament.) made in this kingdom heretofore temporary.	So far as it makes perpetual the act of 2 Anne, c. 14.
6 Geo. 4, c. 50	..An act for consolidating and amending the laws relative to jurors and juries.	The whole of sect. 47.
3 & 4 Will. 4, c. 91.	An act consolidating and amending the laws relating to jurors and juries in Ireland.	The whole of sect. 37.

36 & 37 VICT. c. 52.

36 & 37 Vict. c. 52. *An Act for the Relief of Widows and Children of Intestates where the personal Estate is of small value.*

[28th July, 1873.]

"WHEREAS many poor persons die intestate, possessed of property of small amount, and it is desirable to increase the facilities for taking out letters of administration to their estates and effects, and to reduce the expenses attending the same:" BE IT ENACTED as follows:

For purposes of act application may be made to a registrar of a county court.

1. Where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the county court within the district of which the intestate had his fixed place of abode at the time of his death, and the said registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and

attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said registrar of the county court, to be by him delivered to the party so applying for the same, without the payment of any fee for the same save as is provided by this act.

2. The registrar of the county court may require such proof as he may think sufficient to establish the identity and relationship of the applicant.

3. If the registrar of the county court has reason to believe that the whole estate and effects of which the intestate died possessed exceeds in value one hundred pounds, he shall refuse to proceed with the application until he is satisfied as to the real value thereof.

4. All registrars of county courts shall for the purposes of this act have power and are hereby authorized to administer oaths, and to take declarations and affirmations, and to exercise any other powers which can be exercised by commissioners of the Court of Probate. In the necessary absence of the registrar of the county court, applicants may be sworn and execute any necessary documents at the office of the said registrar before any commissioner of the Court of Probate.

5. Any rules and orders and tables of fees requisite for carrying this act into operation shall be framed and may from time to time be altered by the judge of the Court of Probate, subject as regards the tables of fees to the approval of the commissioners of her Majesty's treasury; and such proportions of the said fees as the said judge, with such approval as aforesaid, shall think proper, may be made payable to the registrars of the county courts acting in the said matters, but the total amount to be charged to applicants shall not in any one case exceed the sums mentioned in the schedule to this act.

6. Provided always that nothing herein contained shall be construed to affect any duty now payable on letters of administration.

7. [Application of act to Ireland.]

SCHEDULE.

Where the whole estate and effects of the intestate shall not exceed in value twenty pounds, the sum of five shillings; and where the whole estate and effects shall exceed in value twenty pounds, the sum of five shillings, and the further sum of one shilling for every ten pounds or fraction of ten pounds by which the value shall exceed twenty pounds.

39 & 40 VICT. c. 59.

39 & 40 Vict.
c. 59. *An Act for amending the Law in respect of the Appellate Jurisdiction of the House of Lords; and for other Purposes.* [11th August, 1876.]

BE IT ENACTED, as follows :

Preliminary.

- Short title. 1. This act may be cited for all purposes as "The Appellate Jurisdiction Act, 1876."
- Commence-
ment of act. 2. This act shall, except where it is otherwise expressly provided, come into operation on the 1st day of November, 1876, which day is hereinafter referred to as the commencement of this act.

Appeal.

- Appeal to
house of lords. 3. Subject as in this act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say,
- England. (1.) Of her Majesty's Court of Appeal in England; and
- Scotland. (2.) Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this act lay to the House of Lords by common law or by statute; and
- Ireland. (3.) Of any Court in Ireland from which error or an appeal at or immediately before the commencement of this act lay to the House of Lords by common law or by statute.
- Form of ap-
peal to house
of lords. 4. Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.
- Quorum and
description of
"lords of
appeal." 5. An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this act designated lords of appeal; that is to say,
- (1.) The lord chancellor of Great Britain for the time being; and
- (2.) The lords of appeal in ordinary to be appointed as in this act mentioned; and
- (3.) Such peers of parliament as are for the time being holding or have held any of the offices in this act described as high judicial offices.

6. For the purpose of aiding the House of Lords in the hearing and determination of appeals, her Majesty may, at any time after the passing of this act, by letters patent appoint two qualified persons to be lords of appeal in ordinary, but such appointment shall not take effect until the commencement of this act.

39 & 40 Vict.
c. 59.

Appointment of two "lords of appeal in ordinary."

A person shall not be qualified to be appointed by her Majesty a lord of appeal in ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two years of some one or more of the offices in this act described as high judicial offices, or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

Qualification.

Every lord of appeal in ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the crown, but he may be removed from such office on the address of both houses of parliament.

Removal.

There shall be paid to every lord of appeal in ordinary a salary of six thousand pounds a year.

Salary.

Every lord of appeal in ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a baron by such style as her Majesty may be pleased to appoint, and shall during the time that he continues in his office as a lord of appeal in ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a lord of parliament shall not descend to his heirs.

To rank as baron for life, but to sit and vote in House of Lords during tenure of office only.

On any lord of appeal in ordinary vacating his office, by death, resignation or otherwise, her Majesty may fill up the vacancy by the appointment of another qualified person.

A lord of appeal in ordinary shall, if a privy councillor, be a member of the judicial committee of the privy council, and, subject to the due performance by a lord of appeal in ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a privy councillor, to sit and act as a member of the judicial committee of the privy council.

Lord of appeal in ordinary, being privy councillor, to sit on judicial committee.

Supplemental Provisions.

7. Her Majesty may, by letters patent, grant to any lord of appeal in ordinary, who has served for fifteen years, or is disabled by permanent infirmity from the performance of the duties of his office, a pension by way of annuity to be continued during his life equal in amount to the pension which might under similar circumstances be granted to the master

Pension of lord of appeal in ordinary.

39 & 40 Vict.
c. 59.

of the rolls, in pursuance of "The Supreme Court of Judicature Act, 1873."

Previous service in any office, described in this act as a high judicial office, shall for the purposes of pension be deemed equivalent to service in the office of a lord of appeal in ordinary under this act.

The salary and pension payable to a lord of appeal in ordinary shall be charged on and paid out of the consolidated fund of the United Kingdom, and shall accrue due from day to day, and shall be payable to the person entitled thereto, or to his executors and administrators, at such intervals in every year, not being longer than three months, as the treasury may from time to time determine.

Hearing
appeals
during pro-
rogation of
parliament.

8. For preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals, and also for the purpose of lords of appeal in ordinary taking their seats and the oaths, during any prorogation of parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of parliament; and all orders and proceedings of the said house in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if parliament had been then sitting, but no business other than the hearing and determination of appeals and the matters connected therewith, and lords of appeal in ordinary taking their seats and the oaths as aforesaid, shall be transacted by such house during such prorogation.

Any order of the House of Lords may, for the purposes of this act, be made at any time after the passing of this act.

Hearing of
appeals
during dis-
solution of
parliament.

9. If on the occasion of a dissolution of parliament, her Majesty is graciously pleased to think that it would be expedient, with a view to prevent delay in the administration of justice, to provide for the hearing and determination of appeals during such dissolution, it shall be lawful for her Majesty, by writing under her sign manual, to authorize the lords of appeal, in the name of the House of Lords, to hear and determine appeals during the dissolution of parliament, and for that purpose to sit in the House of Lords at such times as may be thought expedient; and upon such authority as aforesaid being given by her Majesty, the lords of appeal may, during such dissolution, hear and determine appeals and act in all matters in relation thereto in the same manner in all respects as if their sittings were a continuation of the sittings of the House of Lords, and may in the name of the House of Lords exercise the jurisdiction of the House of Lords accordingly.

Fiat of attor-
ney-general.

10. An appeal shall not be entertained by the House of Lords without the consent of the attorney-general or other

law officer of the crown in any case where proceedings in error or on appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer. 39 & 40 Vict. c. 59.

11. After the commencement of this act error shall not lie to the House of Lords, and an appeal shall not lie from any of the courts from which an appeal to the House of Lords is given by this act, except in manner provided by this act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords. Procedure. Standing orders.

12. Except in so far as may be authorized by orders of the House of Lords an appeal shall not lie to the House of Lords from any court in Scotland or Ireland in any case, which, according to the law or practice hitherto in use, could not have been reviewed by that house, either in error or on appeal. Scotland and Ireland.

13. Nothing in this act contained shall affect the jurisdiction of the House of Lords in respect of any error or appeal pending therein at the time of the commencement of this act, and any such error or appeal may be heard and determined, and all proceedings in relation thereto may be conducted in the same manner in all respects as if this act had not passed. Pending business in house of lords.

Amendment of Acts.

14. Whereas by the act of the session of the thirty-fourth and thirty-fifth years of the reign of her present Majesty, chapter ninety-one, intituled "An Act to make further provision for the despatch of business by the Judicial Committee of the Privy Council," her Majesty was empowered to appoint and did appoint four persons qualified as in that act mentioned to act as members of the judicial committee of the privy council at such salaries as are in the said act mentioned, in this act referred to as paid judges of the judicial committee of the privy council: Amendment of "Judicial Committee Act, 1871."

And whereas the power given by the said act of filling any vacancy occasioned by death, or otherwise, in the offices of the persons so appointed, has lapsed by efflux of time, and her Majesty has no power to fill any such vacancies:

Be it enacted, that whenever any two of the paid judges of the judicial committee of the privy council have died or resigned, her Majesty may appoint a third lord of appeal in ordinary in addition to the lords of appeal in ordinary hereinbefore authorized to be appointed, and on the death or resignation of the remaining two paid judges of the judicial committee of the privy council her Majesty may appoint a fourth lord of appeal in ordinary in addition to the lords of appeal in ordinary aforesaid; and may from time to time Appointment of two additional lords of appeal in ordinary on vacancy in office of paid judges of judicial committee.

39 & 40 Vict.
c. 59. fill up any vacancies occurring in the offices of such third and fourth lord of appeal in ordinary.

Any lord of appeal in ordinary appointed in pursuance of this section shall be appointed in the same manner, hold his office by the same tenure, be entitled to the same salary and pension, and in all respects be in the same position as if he were a lord of appeal in ordinary appointed in pursuance of the power in this act before given to her majesty.

Ecclesiastical
assessors of
judicial com-
mittee.

Her majesty may, by order in council, with the advice of the judicial committee of her majesty's privy council, or any five of them, of whom the lord chancellor shall be one, and of the archbishops and bishops being members of her majesty's privy council, or any two of them, make rules for the attendance, on the hearing of ecclesiastical cases, as assessors of the said committee, of such number of the archbishops and bishops of the church of England as may be determined by such rules.

The rules may provide for the assessors being appointed for one or more year or years, or by rotation or otherwise, and for filling up any temporary or other vacancies in the office of assessor.

Submission
of rules to
parliament.

Any rule made in pursuance of this section shall be laid before each house of parliament within forty days after it is made, if parliament be then sitting, or, if not then sitting, within forty days after the commencement of the then next session of parliament.

If either house of parliament present an address to her majesty within forty days after any such rule has been laid before such house, praying that any such rule may be annulled, her majesty may thereupon, by order in council, annul the same, and the rule so annulled shall thenceforth become void, but without prejudice nevertheless to the making of any other rule in its place, or to the validity of anything which may in the meantime have been done under any such rule.

Appointment
of three addi-
tional ordi-
nary judges
of court of
appeal.

15. Whereas it is expedient to amend the constitution of her majesty's court of appeal in manner hereinafter mentioned: be it enacted, that there shall be repealed so much of the fourth section of "The Supreme Court of Judicature Act, 1875," as provides that the ordinary judges of her majesty's court of appeal (in this act referred to as "the Court of Appeal") shall not exceed three at any one time.

In addition to the number of ordinary judges of the court of appeal authorized to be appointed by "The Supreme Court of Judicature Act, 1875," her majesty may appoint three additional ordinary judges of that court.

The first three appointments of additional judges under this act shall be made by such transfer to the court of appeal as is in this section mentioned of three judges of the high court of

justice, and the vacancies so created in the high court of justice shall not be filled up, except in the event and to the extent hereinafter mentioned. 39 & 40 Vict. c. 59.

Her Majesty may by writing, under her sign manual, either before or after the commencement of this act, but so as not to take effect until the commencement thereof, transfer to the court of appeal from the following divisions of the high court of justice, that is to say, the Queen's bench division, the common pleas division, and the exchequer division, such of the judges of the said divisions, not exceeding three in number, as to her Majesty may seem meet, each of whom shall have been a judge of any one or more of such divisions for not less than two years previously to his appointment, and shall not be an ex-officio judge of the court of appeal, and every judge so transferred shall be deemed an additional ordinary judge of the court of appeal in the same manner as if he had been appointed such judge by letters patent. No judge shall be so transferred without his own consent.

First three appointments to be by transfer of three judges from high court.

Every additional ordinary judge of the said court of appeal appointed in pursuance of this act shall be subject to the provisions of sections twenty-nine and thirty-seven of "The Supreme Court of Judicature Act, 1873," and shall be under an obligation to go circuits, and to act as commissioner under commissions of assize, or other commissions authorized to be issued in pursuance of the said act, in the same manner in all respects as if he were a judge of the high court of justice.

Obligation of additional ordinary judges to go circuit, &c.

There shall be paid to every additional ordinary judge appointed in pursuance of this act, in addition to the salary which he would otherwise receive as an ordinary judge of the court of appeal, such sum on account of his expenses on circuit or under such commission as aforesaid as may be approved by the treasury upon the recommendation of the lord chancellor.

Each of the judges of the high court of justice who is in pursuance of this act transferred to the court of appeal, by writing under the sign manual of her Majesty, shall retain such officers as are attached to his person as such judge, and are appointed and removable by him at his pleasure, in pursuance of "The Supreme Court of Judicature Act, 1873," and the officers so attached shall have the same rank, and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and if entitled to pensions be entitled to the same pensions, and shall, as nearly as may be, perform the same duties as if the judges to whom they are attached had not been transferred to the court of appeal.

Officers of additional ordinary judges.

Subject as aforesaid, the provisions of "The Supreme Court of Judicature Acts, 1873 and 1875," for the time being in force in relation to the appointment of ordinary judges of her

Further appointments, &c.

39 & 40 Vict. c. 59. Majesty's court of appeal, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to such judges, and all other provisions relating to such ordinary judges, shall apply to the additional ordinary judges appointed in pursuance of this section in the same manner as they apply to the other ordinary judges of the said court.

For the purpose of a transfer to the court of appeal under this section, service as a judge in a court whose jurisdiction is transferred to the high court shall be deemed to have been service as a judge in any one or more of such divisions of the high court as are in this section in that behalf mentioned; and for the purpose of the pension of any person appointed under this act an additional ordinary judge of appeal, service in the high court of justice, or in any court whose jurisdiction is transferred to the high court of justice or to the court of appeal, shall be deemed to have been service in the court of appeal.

Orders in relation to conduct of business in court of appeal.

16. Orders for constituting and holding divisional courts of the court of appeal, and for regulating the sittings of the court of appeal, and of the divisional courts of appeal, may be made, and when made, in like manner rescinded or altered, by the president of the court of appeal, with the concurrence of the ordinary judges of the court of appeal, or any three of them; and so much of section seventeen of "The Supreme Court of Judicature Act, 1875," as relates to the regulation of any matters subject to be regulated by orders under this section, and so much of any rules of court as may be inconsistent with any order made under this section, shall be repealed, without prejudice nevertheless to any rules of court made in pursuance of the section so repealed, so long as such rules of court remain unaffected by orders made in pursuance of this section.

Disposal of business in high court before single judge.

17. On and after the 1st day of December, 1876, every action and proceeding in the high court of justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the court of appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place: provided nevertheless, that divisional courts of the high court of justice may be held for the transaction of any business which may for the time being be ordered by rules of court to be heard by a divisional court, and any such divisional court when held

Divisional courts.

shall be constituted of two judges of the court and no more, unless the president of the division to which such divisional court belongs, with the concurrence of the other judges of such division, or a majority thereof, is of opinion that such divisional court should be constituted of a greater number of judges than two, in which case such court may be constituted of such number of judges as the president, with such concurrence as aforesaid, may think expedient; nevertheless the decisions of a divisional court shall not be invalidated by reason of such court being constituted of a greater number than two judges; and

39 & 40 Vict.
c. 59.

Rules of court for carrying into effect the enactments contained in this section shall be made on or before the 1st day of December, 1876, and may be afterwards altered, and all rules of court to be made after the passing of this act, whether made under "The Supreme Court of Judicature Act, 1875," or this act, shall be made by any three or more of the following persons, of whom the lord chancellor shall be one, namely, the lord chancellor, the lord chief justice of England, the master of the rolls, the lord chief justice of the common pleas, the lord chief baron of the exchequer, and four other judges of the supreme court of judicature, to be from time to time appointed for the purpose by the lord chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and all such rules of court shall be laid before each house of parliament within such time and subject to be annulled in such manner as is provided by "The Supreme Court of Judicature Act, 1875."

All future
rules of court
to be made by
committee of
judges.

There shall be repealed on and after the 1st day of December, 1876, so much of sects. 40, 41, 42, 43, 44, and 46 of "The Supreme Court of Judicature Act, 1873," as is inconsistent with the provisions of this section.

Partial repeal
of ss. 40—44
and s. 46 of
Act of 1873.

18. Whenever any two of the said paid judges of the judicial committee of the privy council have died or resigned, her majesty may, upon an address from both houses of parliament, representing that the state of business in the high court of justice is such as to require the appointment of an additional judge, fill up one of the vacancies created by the transfer hereinbefore authorized, by appointing one new judge of the said high court in any division thereof; and on the death or retirement of the remaining two paid judges of the said judicial committee, her majesty may, upon the like address, fill up in like manner another of the said vacancies, and from time to time fill up any vacancies occurring in the offices of judges so appointed.

Power to fill
vacancies in
high court
caused by re-
moval of
judges to
court of
appeal.

19. Where a judge of the high court of justice has been requested to attend as an additional judge at the sittings of the court of appeal under section four of "The Supreme Court

Attendance of
judges of
high court on
court of
appeal.

39 & 40 Vict. of Judicature Act, 1875," such judge shall, although the
c. 59. period has expired during which his attendance was requested, attend the sittings of the court of appeal for the purpose of giving judgment or otherwise in relation to any case which may have been heard by the court of appeal during his attendance on the court of appeal.

Abolition of
appeal from
high court in
cases of
statutory
finality.

20. Where by act of parliament it is provided that the decision of any court or judge the jurisdiction of which court or judge is transferred to the high court of justice is to be final, an appeal shall not lie in any such case from the decision of the high court of justice, or of any judge thereof, to her majesty's court of appeal.

Suspension
until Janu-
ary, 1878, of
power to fill
up vacancies
in legal
offices.

21. Whereas by section thirty-four of the "Supreme Court of Judicature Act, 1875," it is enacted that upon the occurrence of any vacancy in an office coming within the provisions of section seventy-seven of the "Supreme Court of Judicature Act, 1873," the lord high chancellor of Great Britain may, with the concurrence of the treasury, suspend the making any appointment to such office for any period not later than the 1st day of January, 1877, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge in the meantime of the duties of such office, and it is expedient to extend the said period as hereinafter mentioned: be it therefore enacted as follows:

The said section shall be construed as if the 1st day of January, 1878, were therein inserted in lieu of the 1st day of January, 1877.

Appointment
of deputy by
district
registrar.

22. A district registrar of the supreme court of judicature may from time to time, but in each case with the approval of the lord chancellor and subject to such regulations as the lord chancellor may from time to time make, appoint a deputy, and all acts authorized or required to be done by, to, or before a district registrar may be done by, to, or before any deputy so appointed: provided always, that in no case such appointment shall be made for a period exceeding three months. This section shall come into force at the time of the passing of this act.

Appointment
of vice-
admiral,
judge, and
officers of
vice-admi-
ralty court.

23. Whereas by the "Vice-Admiralty Courts Act, 1863," it is enacted, that "nothing in this act contained shall be taken to affect the power of the admiralty to appoint any vice-admiral, or any judge, registrar, marshal, or other officer of any vice-admiralty court, as heretofore, by warrant from the admiralty, and by letters patent issued under the seal of the high court of admiralty of England:"

And whereas since the commencement of the "Supreme Court of Judicature Acts, 1873 and 1875," doubts have arisen with respect to the exercise of the said power of the admiralty,

and it is expedient to remove such doubts: be it therefore enacted as follows: 39 & 40 Vict.
c. 59.

Any power of the admiralty to appoint or cancel the appointment of a vice-admiral, or a judge, registrar, marshal, or other officer of a vice-admiralty court, may, after the passing of this act, be exercised by some writing under the hands of the admiralty, and the seal of the office of admiralty, and in such form as the admiralty from time to time direct.

Every appointment so made shall have the same effect, and every vice-admiral, judge, registrar, marshal, and other officer so appointed shall have the same jurisdiction, power, and authority, and be subject to the same obligation, as if he had been appointed before the commencement of the "Supreme Court of Judicature Acts, 1873 and 1875," under the seal of the High Court of Admiralty of England.

"Admiralty" in this section means the lord high admiral, or the commissioners for executing his office, or any two of such commissioners.

Repeal and Definitions.

24. Section sixteen of the act for better enforcing church discipline, passed in the session of the third and fourth years of the reign of her present Majesty, chapter eighty six and sections twenty, twenty-one, and fifty-five of the "Supreme Court of Judicature Act, 1873," and section two of the "Supreme Court of Judicature Act, 1875," shall be repealed (with the exception of so much of section two as declares the day on which that act is to commence). Repeal of certain sections of the Church Discipline Act and of the Supreme Court of Judicature Acts.

25. In this act, if not inconsistent with the context, the following expressions have the meaning hereinafter respectively assigned to them; that is to say, Definitions.

"High judicial office" means any of the following offices; High judicial office.
that is to say,

The office of lord chancellor of Great Britain or Ireland, or of paid judge of the judicial committee of the privy council, or of judge of one of her Majesty's superior Courts of Great Britain and Ireland:

"Superior Courts of Great Britain and Ireland" means and includes,— Superior courts.

As to England, her Majesty's High Court of Justice and her Majesty's Court of Appeal, and the superior Courts of law and equity in England as they existed before the constitution of her Majesty's High Court of Justice; and As to Ireland, the superior Courts of law and equity at Dublin; and

As to Scotland, the Court of Session:

"Error" includes a writ of error or any proceedings in or by way of error. Error.

39 & 40 VICT. c. 70.

39 & 40 Vict.
c. 70.

An Act to alter and amend the Law relating to the Administration of Justice in Civil Causes in the Ordinary Sheriff Courts in Scotland, and for other purposes relating thereto.
[15th August, 1876.]

Note in confirmation by sheriff, clerk, or commissary clerk, that deceased died domiciled in Scotland substituted for certified copy interlocutor by the sheriff commissary and to have like effect.

41. Where, under the provisions of the ninth and subsequent sections of the act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, intituled "An Act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation and of grants of probate and administration," it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff clerk to insert in the confirmation or to note thereon and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland; and sections twelve and thirteen of the said act, so far as they make it a condition of the sealing of a confirmation in the principal court of probate in England or in the court of probate in Dublin, that the copy of the confirmation provided to be deposited with the registrar shall be accompanied by such a certified copy interlocutor, are hereby repealed.

Extension of the provisions of ss. 12 and 13 of 21 & 22 Vict. c. 56.

42. When an additional inventory has been given in and recorded and confirmation granted in a sheriff court in Scotland of estate situated in England or Ireland of a person who died domiciled in Scotland, and the additional confirmation shall be produced in the principal court of probate in England, or in the court of probate in Dublin, as the case may be, and a copy thereof deposited with the registrar of the court, such additional confirmation shall be sealed with the seal of the court and returned to the person producing the same, and that whether the original confirmation shall have been sealed with the seal of the court or not, and although the additional inventory confirmed shall not contain any estate of the deceased situated in Scotland, and such additional confirmation when so sealed shall thereafter have the same force and effect as if probate or letters of administration,

as the case may be, had been granted by the court of probate in which it had been sealed. 39 & 40 Vict. c. 70.

43. When any confirmation or additional confirmation of personal estate situated in Scotland, which shall contain or have appended thereto and signed by the sheriff clerk a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall be produced in the principal court of probate in England or in the court of probate in Dublin, as the case may be, such confirmation shall be sealed with the seal of such court in the same manner as is provided by sections twelve and thirteen of the act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, as amended by this act, with respect to sealing confirmations which include personal estate situated in England or Ireland respectively; and such confirmation shall thereafter have the like force and effect in England and Ireland with respect to such funds as if probate or letters of administration, as the case may be, had been granted by the court of probate in which it had been sealed; and such note or statement may be inserted or appended as aforesaid by the sheriff clerk, provided the same shall have been set forth in any inventory which has been recorded in the books of the court of which he is clerk.

Confirmation of Scotch estate with note of trust funds in England or Ireland to be sealed in probate courts as if it contained English or Irish estate of the deceased.

44. The sheriff clerk shall, after a petition for the appointment of an executor has been intimated by him as provided by section four of the act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, and after receiving the certified copy of the printed and published particulars therein set forth, forthwith certify these facts on the petition in the following or similar terms: "Intimated and published in terms of the statute," which certificate (in lieu of the certificate in the form of schedule C. annexed to the said act, which schedule C. is hereby repealed,) shall be dated and signed by him, and shall be sufficient evidence of the facts therein set forth: Provided always, that special intimation shall be made to all executors already decerned or confirmed to a deceased person of any subsequent petition for the appointment of an executor which may be presented with reference to the personal estate of the same deceased person.

Schedule C. of 21 & 22 Vict. c. 56, hereby repealed, and new form of intimation, &c.

45. It shall be the duty of the commissary clerk of Edinburgh, on or before the thirty-first day of December one thousand eight hundred and seventy-seven, and on or before the thirty-first day of December in every year thereafter, to prepare and issue a printed calendar containing a list or register, alphabetically arranged, of all confirmations granted,

A calendar of confirmations and inventories to be published annually.

39 & 40 Vict.
c. 70. and of all inventories given in, in cases in which from any cause confirmation shall not have been required in Scotland, in the year ending on the thirty-first day of December immediately preceding, specifying in each case the name and designation, and the place and date of death of the person deceased; whether he died testate or intestate; the names and designations of his executors; date of confirmation or recording of inventory; the date of the will or deed, if any; and where and of what date the same was registered; and the value of the estate: provided as follows:

- (1.) It shall be the duty of every sheriff clerk to furnish to the commissary clerk of Edinburgh on or before the fifteenth day of February one thousand eight hundred and seventy-seven such a list or register of confirmations granted, and inventories given in, within the sheriffdom of which he is such clerk (with all the particulars above specified) in the year ending on the thirty-first day of December immediately preceding; and thereafter quarterly, on or before the first days of February, May, August and November in each year, to furnish to the commissary clerk of Edinburgh such a list or register, with such particulars as aforesaid, of all confirmations and inventories granted, or given in, within such sheriffdom in the quarters ending on the thirty-first day of December, the thirty-first day of March, the thirtieth day of June, and the thirtieth day of September immediately preceding respectively:
 - (2.) A copy of every such calendar issued shall be sent by the commissary clerk of Edinburgh to every sheriff clerk in Scotland, who shall keep the same in his office open for the inspection of the public on payment of such fee as may be fixed by act of sederunt, which the Court of Session are hereby authorised and required to pass:
 - (3.) A copy of every issue of such calendar shall also be sent to the lord clerk register and to the registrars in the Probate Courts of London and Dublin:
 - (4.) The cost of preparing and printing and issuing such calendar and of furnishing copies thereof to the persons to whom they are herein directed to be sent shall be defrayed out of moneys to be voted by parliament.
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CUSTOMS AND INLAND REVENUE ACT, 1881.

44 VICT. c. 12.

An Act to grant certain Duties of Customs and Inland Revenue, to alter other Duties, and to amend the Laws relating to Customs and Inland Revenue.

[3rd June, 1881.]

PART III.

STAMPS.

As to Probate and Legacy Duties, and Duties on Accounts.

26. (1.) The stamp duties hereinafter imposed shall be under the care and management of the commissioners of inland revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof as are by law vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying into effect the provisions of this act in relation to such stamp duties.

Stamp duties to be under the care and management of the Commissioners of Inland Revenue.

(2.) Such stamp duties may be denoted by impressed or adhesive stamps, or partly by impressed stamps and partly by adhesive stamps, as the said commissioners may think proper.

(3.) As respects the duties imposed on affidavits in substitution for the duties on probates or letters of administration, the several provisions now in force in relation to the last-mentioned duties shall, so far as the same are consistent with the provisions of this act, be deemed to be applicable to the said duties hereby imposed, and in the application thereof a probate or letters of administration having thereon such a certificate as is hereinafter mentioned shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate.

Duty stamp.

Certificate.

27. The duties imposed by the Customs and Inland Revenue Act, 1880, upon probates of wills and letters of administration in England and Ireland shall not be payable upon probates or letters of administration granted *on and after the first day of June one thousand eight hundred and eighty-one*; and on and after that day in substitution for such duties, and in lieu of the duties imposed by the said act upon inventories in Scot-

Grant of duties in respect of probate and letters of administration and on inventories.

land, there shall, save as is hereinafter expressly provided, be charged and paid on the affidavit to be required and received from the person applying for the probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, the stamp duties hereinafter specified; (that is to say,)

Where the estate and effects for or in respect of which the probate or letters of administration is or are to be granted, or whereof the inventory is to be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as trustee, and not beneficially, shall be above the value of 100*l.*, and not above the value of 500*l.* -

DUTY.

At the rate of one pound for every full sum of 50*l.*, and for any fractional part of 50*l.* over any multiple of 50*l.*;

Where such estate and effects shall be above the value of 500*l.*, and not above the value of 1,000*l.* - - - -

At the rate of one pound five shillings for every full sum of 50*l.*, and for any fractional part of 50*l.* over any multiple of 50*l.*;

Where such estate and effects shall be above the value of 1,000*l.* - - - -

At the rate of three pounds for every full sum of 100*l.*, and for any fractional part of 100*l.* over any multiple of 100*l.*;

Provided that an additional inventory, to be exhibited or recorded in Scotland, of any effects of a deceased person, where a former inventory of the estate and effects of the same person has been exhibited and recorded prior to the *first day of June one thousand eight hundred and eighty-one*, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this act had not been passed.

28. *On and after the first day of June one thousand eight hundred and eighty-one*, in the case of a person dying domiciled in any part of the united kingdom, it shall be lawful

Power to deduct debts and funeral expenses

for the person applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the united kingdom, and the funeral expenses, and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited.

where deceased died domiciled in the united kingdom.

Debts to be deducted under the power hereby given shall be debts due and owing from the deceased and payable by law out of any part of the estate and effects comprised in the affidavit or inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been bonâ fide delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable or a reimbursement may be capable of being claimed from any real estate of the deceased or from any other estate or person.

Debts which may be so deducted.

Funeral expenses to be deducted under the power hereby given shall include only such expenses as are allowable as reasonable funeral expenses according to law.

Funeral expenses.

29. The affidavit to be required or received from any person applying for probate or letters of administration in England or Ireland shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debts and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the commissioners of her Majesty's treasury; and the commissioners of inland revenue shall provide forms of affidavit stamped to denote the duties payable under this act.

As to forms of affidavit.

30. No probate or letters of administration shall be granted by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, or by the Probate and Matrimonial Division of the High Court of Justice in Ireland, unless the same bear a certificate (a) in writing under the hand of the proper officer of the court, showing that the affidavit for the commissioners of inland revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.

Duty stamp to be on affidavit.

Probate or letters of administration to bear a certificate in lieu of stamp duty.

31. If at any time after the grant of probate or letters of administration, and during the administration of the estate, the value mentioned in the certificate of the officer of the court

Provision for return of duty overpaid.

shall be found to exceed the true value of the personal estate and effects of the deceased, or if at any time within three years after the grant, or within such further period as the commissioners of inland revenue may allow, it shall appear that no amount or an insufficient amount was deducted on account of debts and funeral expenses, it shall be lawful for the said commissioners, upon proof of the facts to their satisfaction, to return the amount of stamp duty which shall have been overpaid, and to cause a certificate to be written by an authorized officer on the probate or letters of administration setting forth such true value, or, as the case may be, the amount, or corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the court.

Provision for
payment of
further duty.

32. If at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit with an account to the commissioners of inland revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said commissioners interest upon such amount at the rate of five pounds per centum per annum from the date of the grant, or from such subsequent date as the said commissioners may in the circumstances think proper.

The commissioners of inland revenue, upon the receipt of such affidavit duly stamped as aforesaid, shall cause a certificate to be written by an authorized officer on the probate or letters of administration setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the court.

Provisions as
to obtaining
probate, &c.
where gross
value of estate
does not
exceed 300l.

33. (1.) Where the whole personal estate and effects of any person dying *on or after the first day of June one thousand eight hundred and eighty-one* (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of the united kingdom), *without any deduction for debts or funeral expenses*, shall not exceed the value of three hundred pounds, it shall be lawful for the person * intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper officer of the court or to any officer of

*Application
can be made
in person, or
through a
solicitor.

inland revenue duly appointed for the purpose, a notice in writing in the prescribed form, setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of fifteen shillings for fees of court and expenses, and also, in case the estate and effects shall exceed the value of one hundred pounds, the further sum of thirty shillings for stamp duty.

(2.) If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the value of three hundred pounds, he shall refuse to accept the notice and deposit until he is satisfied of the true value thereof.

(3.) The principal registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, and of the Probate and Matrimonial Division of the High Court of Justice in Ireland, in communication with the commissioners of inland revenue, shall prescribe the form of notice, and make such regulations as may be necessary with respect to the transmission of notices by officers of inland revenue, the steps to be taken for the preparation and filling up of forms and documents, and generally all matters which may be necessary, so as to authorize the grant of probate or letters of administration.

(4.) Officers of inland revenue are hereby empowered to administer all necessary oaths or affirmations, and in the case of letters of administration, to attest the bond and accept the same on behalf of the president or judge of the Division.

(5.) Where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the affidavit for the commissioners of inland revenue shall be the fixed duty of thirty shillings, and no more.

34. (1.) The Intestates, Widows, and Children (Scotland) Act, 1875, and the Small Testate Estate (Scotland) Act, 1876, as amended by the Sheriffs Court (Scotland) Act, 1876, shall be extended so as to apply to any case where the whole personal estate and effects of a person dying *on or after the first day of June one thousand eight hundred and eighty-one*, without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, and the fees payable under schedule C. of each of the two first-mentioned acts shall not exceed the sum of fifteen shillings, inclusive of the fee of two shillings and sixpence, to be paid to the commissary clerk, or sheriff clerk.

Provision as to inventories where gross value of estate does not exceed 300*l*.
39 & 40 Vict. c. 24.
39 & 40 Vict. c. 70.

(2.) In any such case where the estate and effects shall exceed the value of one hundred pounds, the stamp duty

payable on the inventory shall be the fixed duty of thirty shillings, and no more.

Provision in case of subsequent discovery that the value of estate exceeded 300*l*.

35. Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum.

Relief from legacy duty in cases under 300*l*.

36. The payment of the sum of thirty shillings for the fixed duty on the affidavit or inventory in conformity with this act shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates.

Power to commissioners to require explanations and proof in support of affidavit or inventory.

37. It shall be lawful for the commissioners of inland revenue at any time and from time to time within three years after the grant of probate or letters of administration or recording of inventory, as they may think necessary, to require the person acting in the administration of the estate and effects of any deceased person, to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit or inventory as the case may seem to them to require.

Grant of duties on accounts of certain property.

38. (1.) Stamp duties at the like rates as are by this act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

(2.) The personal or moveable property to be included in an account shall be property of the following descriptions, viz. :—

(a) Any property taken as a *donatio mortis causâ* made by any person dying on or before the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased.

(b) Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly whether by disposition or otherwise,

so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

- (c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

(3.) Where an account delivered duly stamped comprises property passing under a voluntary settlement, and, upon the production of the settlement, it shall appear that the stamp duty of five shillings per centum has been paid thereon according to the amount or value of the property so passing, or any part thereof, the amount of such stamp duty shall be returned to the person delivering the account.

39. Every person who as beneficiary, trustee, or otherwise, acquires possession, or assumes the management, of any personal or moveable property of a description to be included in an account according to the preceding section shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased deliver to the commissioners of inland revenue a full and true account, verified by oath, of such property duly stamped as required by this act. Any officer authorised by the commissioners for the purpose may administer the oath.

Delivery of accounts on oath.

40. If any person who ought to obtain probate or letters of administration or deliver a further affidavit or to exhibit an inventory or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to her majesty double the amount of duty chargeable, and the same shall be a debt due from him to the crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy or succession duties.

Officers of the Inland Revenue duly authorized may administer oaths. Double duty payable in case of default.

41. In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this act, the duty at the rate of one pound per centum imposed by the act of the fifty-fifth year of king George the third, chapter one hundred and eighty-four, shall not be payable;

Cesser of legacy and succession duties at the rate of one per cent. in certain cases.

And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit

16 & 17 Vict.
c. 51.

Charge of
legacy duty
on legacies
not amount-
ing to 20*l*.

Power to com-
missioners to
accept com-
position for
legacy duty
under a will.

or inventory or account in conformity with this act, the duty at the rate of one pound per centum imposed by the Succession Duty Act, 1853, shall not be payable.

42. Subject to the relief from legacy duty given by section thirteen of the Customs and Inland Revenue Act, 1880, every pecuniary legacy or residue or share of residue under the will or the intestacy of a person dying on or after the first day of June one thousand eight hundred and eighty-one, although not of an amount or value of twenty pounds, shall be chargeable to the duties imposed by the said act of the fifty-fifth year of king George the third, chapter one hundred and eighty-four, as modified by this act.

43. It shall be lawful for the commissioners of inland revenue, upon the application of the person acting in the execution of the will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof legacy duty is payable, together with the names or description of class of the persons entitled thereto and every part thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for legacy duty under such will.

If the commissioners are of opinion that an application should receive the assent of any person, they shall refuse to entertain the application until such assent shall have been given.

The SCHEDULE.

Session and Chapter.	Title of Act.	Extent of Repeal.
30 & 31 Vict. c. 23	An Act to grant and alter certain Duties of Customs and Inland Revenue, and for other purposes relating thereto.	Sections five and six, and Schedule E.

The foregoing act provides that the Duty Stamp for probate and administration shall be affixed to the Inland Revenue Affidavit, so that in future no grant of probate or administration will have impressed upon it the Duty Stamp as heretofore.

In cases of double probate, cessate and de bonis grants, though the free mark will have to be obtained as pre-

viously explained (*ante*, p. 269), the stamp or free mark will appear on the Inland Revenue Affidavit.

It will be observed that the provisions of the 33rd section of this act, whereby the Court fees and expenses,—where the whole of the estate in England and abroad exceeds 100*l.*, but does not exceed in value the sum of 300*l.*,—is fixed at 15*s.*, and the duty on such estates at 30*s.*, applies only to the administration of the effects of persons dying *on or after 1st June, 1881.*

The following are some of the instructions and directions issued for the carrying into effect of the aforesaid act :—

*Instructions to Collectors and Supervisors of Inland Revenue for carrying out Section 33 of the Customs and Inland Revenue Act, 1881, under which Officers of Inland Revenue are to be made available as Agents for obtaining Grants of Probate or Letters of Administration where the gross value of Personal Estate (without any deduction for Debts or Funeral Expenses) does not exceed 300*l.**

GENERAL, AND AS TO ACCOUNTS.

1. For the present the Board only intend to utilize for this purpose certain collectors, their chief clerks, and supervisors not located in towns where there are district registries of the Court of Probate, who will be duly authorized for the purpose.

2. As, however, there will be some supervisors in all collections employed on this work, and as it is intended to collect the duty of 30*s.* on the affidavits and the fee of 15*s.* on the notice by means of stamps, the Board intend to make all officers, so authorized, sub-distributors of stamps to their proper collectors.

Detailed Instructions as to Procedure.

(A.) By section 33, sub-section 1, of the above act it is enacted that—

“ Where the whole personal estate and effects (1) of any person dying *on or after the 1st June, 1881* (inclusive of property by law made such personal estate and effects (2) for the purpose of the charge of duty, and any personal estate and effects situate out of the United Kingdom), (3) *without any deduction for debts or funeral expenses*, (4) shall not exceed the value of three hundred pounds, it shall be lawful (5) for the person intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper

officer of the court or to any officer of inland revenue duly appointed for the purpose, (6) a notice in writing in the prescribed form, (7) setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of *fifteen shillings* for Fees of Court and Expenses, (8) and also in case the estate and effects shall exceed the value of one hundred pounds, (9) the further sum of *thirty shillings* for Stamp Duty." (10)

Personal estate.

Description of property to which such term applies.

Property passing by will in exercise of a power of appointment.

Property out of the United Kingdom.

Debts or funeral expenses not to be deducted.

Application for probate, &c. where to be made.

Inland Revenue Officer.

Notice of application.

(1.) It will be observed only "*personal estate and effects*" are to be taken into account. The rents of real or leasehold property due to a deceased, at the date of his death, and the rents of leasehold property, due since his death up to the time of applying for the grant, are, however, to be included, also the value of any leasehold property as well as the proceeds of any real estate *contracted* to be sold in the life-time of deceased. Such property as "book debts, foreign stocks or funds transferable in England, ships or shares of ships at sea, policies of insurance and bonuses thereon, growing crops, good-will or tenant right," should also be taken into the calculation in determining whether the whole estate of a deceased is above the value of 300*l.* In any case of doubt as to whether certain property should or should not be included application should be made to the board for instructions.

(2.) "*Inclusive of property by law made such personal estate and effects, &c.*"—That is property which the deceased has disposed of by his will in pursuance of a general and absolute power to appoint it as he should think fit.

(3.) "*Any personal estate or effects situate out of the United Kingdom.*"—This is important. Personal property out of the jurisdiction of the English Courts, although not in itself liable to probate duty, must be taken into account in determining whether the gross value of the *whole* personal estate is below 300*l.*

(4.) "*Without any deduction for debts or funeral expenses.*"—In other words the *gross total* of the personal estate and effects of the deceased, wherever situate.

(5.) "*It shall be lawful.*"—It is not compulsory in such cases for the person intending to apply for probate, &c. to apply to the Inland Revenue officer. Such person may, if he think fit, apply to the Registrar of the Court of Probate.

(6.) "*To any officer of Inland Revenue duly appointed for the purpose.*"—Only such officers as hold the deputation of the board in this behalf will be authorized to act under this section.

(7.) "*A notice in writing in the prescribed form.*"—The form of notice has been so drawn as to be used by the officer, but it may also be made available by the applicants by striking out such words as are inappropriate. He should fill up an unstamped form, sign and deliver it to the officer, who should

file it. The officer should then fill up the notice impressed with the 15s. fee stamp, sign it, and send it on to the proper probate registry, or to the principal registry, as the case may be.

(8.) "*To deposit with him (the officer) the sum of fifteen shillings for fees, &c.*"—The notices will be on forms stamped with a stamp of fifteen shillings. Fee.

(9.) "*In case the estate and effects shall exceed the value of one hundred pounds.*"—Estates below one hundred pounds are not liable to probate duty, and, in such cases, only the fee of 15s. on the notice will be payable. It may be noted that in the case of intestacies, *i.e.*, where there is no will, and the whole estate and effects of a deceased shall not exceed in value the sum of *one hundred pounds*, the widow or children of a deceased person, if they reside more than three miles from the registry of the court of probate, can apply to the registrar of the county court, who is required on payment of certain pre-

scribed fees, ranging from 5s. to 13s., to assist them to take out administration. (See 36 & 37 Vict. c. 52, and 38 & 39 Vict. c. 27.) Estates not
liable to duty.

County court
application
for admini-
stration may
be made to.
Stamp duty.

(10.) "*The further sum of thirty shillings for stamp duty.*"—This is impressed on the affidavit.

(B.) By section 33, sub-section 2, it is enacted that:—

"If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the value of three hundred pounds he shall refuse to accept the notice and deposit until he is satisfied of the real value thereof."

In such a case the officer must fully report the facts to the board. The officer must be careful that advantage is not improperly taken of sect. 33, sub-sect. 1. If the effects are sold or intended to be sold the result of the sale should be obtained. With regard to stocks, their value is shown in the daily newspapers.

(C.) By section 33, sub-section 3, the principal registrars of the probate division of the high court in communication with the commissioners of inland revenue are to make such regulations as may be necessary "with respect to the transmission of notices by officers of inland revenue, the steps to be taken for the preparation and filling up of forms and documents, and generally all matters which may be necessary, so as to authorize the grant of probate or letters of administration." Value of
stocks.

The principal
registrars of
the probate
division to
make all
necessary
regulations.

In transmitting documents to the various district registries or to the principal registry the board enjoin on their officers the utmost care in making the address on the envelope distinct so that there may be no miscarriage of the contents. In the event of the loss of any document the inconvenience would be very serious, but in the case of a will it would be irremediable; letters, therefore, containing wills must always be registered, the cost being claimed in the same manner as postage.

Officers of inland revenue to administer oaths and attest bonds.

(D.) By section 33, sub-section 4, it is enacted that—

“Officers of inland revenue are hereby empowered to administer all necessary oaths or affirmations, (1) and in the case of letters of administration, to attest (2) the bond (3) and accept the same on behalf of the president or judge of the division.”

(2.) “*To attest.*”—The officer attesting must sign his name, description and address in full and the date.

Bond.

(3.) “*The bond.*”—A bond is requisite in all cases of administrations. Attention is called to clause 8 of the subsequent regulations. The officer must satisfy himself by inquiry that the sureties are sufficient.

Stamp duty on bonds.

Administration bonds for amounts above 100*l.* are liable to a stamp duty of 5*s.*, which the party taking out letters of administration is to be required to pay. Where the amount of the bond is under 100*l.* no stamp duty is payable thereon.

(E.) By section 35 of the act it is enacted that:—

Estate discovered—after obtaining representation—to be above the value of 300*l.*

“Where representation has been obtained” in England or Ireland through the agency of an officer of inland revenue, under the said acts in relation to personal estates of small value, “and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him. He would also in such circumstances become liable to legacy duty.”

The following are the directions which the registrars of the principal probate registry of the high court of justice acting in concurrence with the commissioners of inland revenue have issued, for the guidance of the inland revenue officers appointed for the purpose of receiving notices of application for grants of probate and letters of administration with or without will annexed, in pursuance of the Customs and Inland Revenue Act of 1881, as to the particulars required to be stated in such notices, the regulations with respect to the transmission of the same, and of the forms and documents to authorize the grant of probate or letters of administration:—

Notices of application for grants. Probate.

(1.) There are three forms of notices of application, marked “No. 1,” “No. 1A,” “No. 1B.”

(2.) No. 1.—This form is to be used only in case of the deceased person in respect of whose property an application for a representation is made, having left a will or will and

codicils, and having in such will or codicils appointed one or more executors who are applying for a grant of probate. The dates of the will and of the codicils (if any), the residence and description of the testator or testatrix as it appears in such will and codicils, the date of his or her death, and where it occurred, should be inserted in the notice in the manner pointed out in the specimen form filled up, also the proper names in full and the addresses of the executor or executors, also an extract from the will setting out the appointment of executor or executors, and if varied by codicil a further extract from the codicil setting out the new or altered appointment. These extracts are to be copied at foot of the notice.

(3.) Every will and codicil to be admissible to probate without evidence must have on the face of it an attestation showing that it has been duly executed, viz., by the testator signing his name or acknowledging his signature, or by some other person signing the will for him in his presence and by his direction, in presence of two witnesses, and by these two witnesses having subscribed their names in the presence of the testator. No alterations in a will or codicil can be accepted as part of it unless shown by the attestation to have been made before execution, or unless verified by the initials of the testator and witnesses written opposite to them.

Will and codicil must have been duly executed.

Alterations verified.

(4.) If the will is defective in any of these particulars the applicant should be at once referred to the principal or the proper district probate registry. In case there are executors appointed by the will who decline to join in the probate, it must be stated in the notice whether they will renounce their right to probate or will have a power reserved to them to prove the will at a future time, if they think fit to do so. When the notice with these particulars supplied in it is completed, it should be sent to the probate registrar of the district in which the testator had his fixed place of abode at the time of his death, or to the principal probate registry, Somerset House, London, where the necessary forms of oath or affirmation and other documents will be prepared, and from whence these papers will be forwarded to the Inland Revenue officer to be sworn and completed. The original will and codicils will be annexed to the papers when they are so sworn and completed, and they must be marked with the signatures of the executor or executors and of the Inland Revenue officer to identify them as the testamentary papers sworn to. All the papers when completed must be forwarded to the principal or district probate registry where they were prepared, with the Inland Revenue Office affidavit showing the gross amount of the personal estate. On the return of the grant the officer will, on delivery to the party, take a receipt for it in the register provided for the purpose.

Executors renouncing.

Will and codicils to be marked by executors.

The will of a female married at the time of making it can
 B. U U Will of feme covert.

only be admitted to proof under special circumstances, and the applicant for probate of such a will or for letters of administration with such a will annexed should be at once referred to the district or principal probate registrar.

Administra-
tion with
the will
annexed.

(5.) No. 1A. This form is to be used only when there is a will or will and codicil and no executor thereby appointed, or the executor appointed declines to accept probate or has died, either in the testator's lifetime or since his death. It should contain all the particulars stated to be requisite in filling up Form of Notice No. 1, and also set out the date of death of the executors (if any) and the name and address in full of the person claiming the grant, and the extracts from the will or codicil should not only set out the appointment of executors, but also the words by which the residue of the personal property is bequeathed, whether absolutely in trust for life or in reversion. In this order persons claiming a grant of administration would be entitled to it, and therefore, if the applicant does not stand first in order he or she must set out the date of death of those who would be entitled in priority. The rest of the directions in respect to the completion and transmission of papers given as to Notice No. 1 will be applicable also to this notice and to the next mentioned Notice No. 1B.

Administra-
tion.

(6.) No. 1B. This form is to be used only in case the deceased person in respect to whose property an application for a representation is made has left no will. The particulars as to the residence and description of the intestate and the time and place of his or her death must be inserted in the notice, and the name in full and address of the person applying for the grant of letters of administration and his relationship to the intestate. The claims to such a grant are admissible in the following order :—

Next of kin.

- 1st. Husband or widow of intestate.
- 2nd. Child.
- 3rd. Grandchild.
- 4th. Father.
- 5th. Mother.
- 6th. Brothers or sisters, or grandfather or grandmother.
- 7th. Uncles or aunts, nephews or nieces.
- 8th. Cousin-german.

Persons en-
titled in
distribution.

(7.) If children, or brothers or sisters of an intestate, were his next of kin at the time of his death, and have all since died, the children of a child or of a brother or sister of the intestate who had died in his lifetime may take a grant of letters of administration ; but in that case the dates of death of the next of kin and also the date of death of the parent of the applicant must be set forth in the notice.

In all cases an applicant for a grant must show that no person survived the intestate in such relationship to him as to give such person a prior right to the claimant. For examples as to this, see *ante*, p. 306.

(8.) No. 1A and No. 1B.—Every person to whom letters of administration, whether with or without will annexed, are granted, are required to enter into a bond with two sureties for his or her faithful administration. These sureties may be males or females, but if females, must be unmarried, and described as “widow” or “spinster.” The penalty to be inserted in the bond is double the amount under which the *gross* value of the personal estate is sworn. The names, addresses, and quality or description of the two persons who will join the administrator in his or her bond as such sureties should be set out in the notice, and the Inland Revenue officer who administers the necessary oath or affirmation to the administrator should also see the administrator and his or her sureties sign, and should attest the bond.

Bond with
two sureties.

Who may be
sureties.

Penalty.

(9.) If any application should be made to the Inland Revenue officers not contemplated in these directions, or any difficulty presents itself in carrying out these directions, the applicant should at once be referred to the principal or one of the district probate registries.

SPECIMENS of FORMS of NOTICE of APPLICATION referred to in
the foregoing REGULATIONS.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division.

(Probate.)

day of 188 .

NOTICE IS HEREBY GIVEN, that application has been made to me for a grant of probate of the will bearing date the 30th day of October, 1875, of William Kelley, formerly of St. Austell, in the county of Cornwall, late of Plymouth, in the county of Devon, builder, deceased, who died on the 3rd day of June, 1881, at Headland Park, Plymouth, aforesaid, having at the time of his death a fixed place of abode at Plymouth aforesaid, within the district of the county of Devon, by Caroline Kelley, of Headland Park, in Plymouth aforesaid, widow, the relict of the deceased, the sole executrix named in the said will in the words following:—

“And I appoint her the said Caroline Kelley sole executrix of this my will.”

To the Registrars of the Principal Probate Registry,

or

To the District Probate Registrar at .

No. 1a.

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division.

(Probate.)

day of 188 .

NOTICE IS HEREBY GIVEN, that application has been made to me for a grant of letters of administration with the will annexed, the said will bearing date the 2nd day of February, 1881, of the personal estate of Ann Oughton, widow, formerly of Penrith, in the county of Cumberland, late of Findon Hill, in the county of Durham, deceased, who died on the 11th

day of *June*, 1881, at *Findon Hill aforesaid*, having at the time of her death a fixed place of abode at *Findon Hill aforesaid*, within the district of the county of *Durham*, by *Harrison Oughton*, the son of the said deceased, and the universal legatee named in the said will in the words following:—

"I hereby give to my son *Harrison* what I may leave."

There being no executor.

To the Registrars of the Principal Registry,

or

To the District Probate Registrar at .

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce, and Admiralty Division.

(Probate.)

day of 188 .

NOTICE IS HEREBY GIVEN, that application has been made to me for a grant of letters of administration of the personal estate and effects of *Stephen Kirk*, formerly of *Wangford*, in the county of *Suffolk*, late of *Russell Street*, *St. John's Sepulchre*, in the city of *Norwich*, gardener, deceased, who died on the 3rd day of *June*, 1881, at *Russell Street aforesaid*, intestate, having at the time of his death a fixed place of abode at *Russell Street aforesaid*, within the district of the county of *Norfolk*, by *Bathsheba Kirk*, the lawful widow and relict of the said deceased.

To the Registrars of the Principal Probate Registry,

or

To the District Probate Registrar at .

SCALE OF DUTIES ON PROBATES AND ADMINISTRATIONS.

Value of Estates.				Rate of Duty.	
				£	s.
If deceased died on or after 1st June, 1881, and the whole of the estate in England and elsewhere is above the value of £100 and under £300				1	10
If deceased died before 1st June, 1881, or if the net value of the estate, after deducting debts, be—					
Above the value of £100 and not above the value of				3	0
	150	"	"	200	4 0
	200	"	"	250	5 0
	250	"	"	300	6 0
	300	"	"	350	7 0
	350	"	"	400	8 0
	400	"	"	450	9 0
	450	"	"	500	10 0
	500	"	"	550	13 15
	550	"	"	600	15 0
	600	"	"	650	16 5
	650	"	"	700	17 10
	700	"	"	750	18 15
	750	"	"	800	20 0
	800	"	"	850	21 5
	850	"	"	900	22 10
	900	"	"	950	23 15
	950	"	"	1000	25 0
	1000	"	"	1100	33 0
£3 being added for every £100 or fractional part of £100.					

FEES

IN THE

PRINCIPAL AND DISTRICT PROBATE REGISTRIES OF THE HIGH COURT OF JUSTICE

IN

NON-CONTENTIOUS BUSINESS,

IN LIEU OF THE CORRESPONDING FEES AT PRESENT TAKEN IN THE SAID REGISTRIES.

*For Probates or Letters of Administration with or without Will annexed, under Seal,—when the GROSS Value of the Personal Estate does not exceed 300*l.*, and (if Stamp Duty is payable) a Stamp of 1*l.* 10*s.* is paid upon the Affidavit.*

A fee to cover all expenses, whether such grant is obtained on personal application or otherwise £ s. d.
0 15 0

For all other Probates or Letters of Administration with or without Will annexed, under Seal, including Double or Cessate Probates or Letters of Administration with or without Will annexed, de bonis non or cessate,—upon which Stamp Duty is payable in respect of the Value of the Personal Estate of the Testator or Intestate.

If the Personal Estate for or in respect of which Stamp Duty is payable is under or not exceeding—		If under or not exceeding—		£	s.	d.
£	£ s. d.	£8,000	.....	6	0	0
100	0 1 0	9,000	.....	6	15	0
150	0 1 6	10,000	.....	7	10	0
200	0 2 0	12,000	.....	9	0	0
250	0 2 6	14,000	.....	10	10	0
300	0 3 0	16,000	.....	12	0	0
350	0 3 6	18,000	.....	13	10	0
400	0 4 0	20,000	.....	15	0	0
450	0 4 6	25,000	.....	18	15	0
500	0 5 0	30,000	.....	22	10	0
550	0 6 9	35,000	.....	26	5	0
600	0 7 6	40,000	.....	30	0	0
650	0 8 3	45,000	.....	33	15	0
700	0 9 0	50,000	.....	37	10	0
750	0 9 9	60,000	.....	45	0	0
800	0 10 6	70,000	.....	52	10	0
850	0 11 3	80,000	.....	60	0	0
900	0 12 0	90,000	.....	67	10	0
950	0 12 9	100,000	.....	75	0	0
1,000	0 15 0	120,000	.....	90	0	0
1,500	1 2 6	140,000	.....	105	0	0
2,000	1 10 0	And for every full sum of £100 or any fractional part of £100 over any multiple of £100 between any of the sums exceeding £1,000 in the above table, a further fee of.....				0 1 6
3,000	2 5 0	If above £140,000				105 0 0
4,000	3 0 0					
5,000	3 15 0					
6,000	4 10 0					
7,000	5 5 0					

And for registering and collating or engrossing and collating wills and other documents registered with the same—if three folios of ninety words each or under—including parchment, except wills and documents registered with them admitted to probate on personal application	£	s.	d.
	0	4	6
In any case, if above three folios of ninety words each, for each additional folio	0	1	6

The following Additional Fees are to be taken in the Principal and District Probate Registries in Non-Contentious Business on PERSONAL APPLICATIONS.

For preparing oaths of executors or administrators and affidavits for the Inland Revenue Office—for engrossing and collating the will (if three folios of ninety words or under) for clerks; also for administering oaths or affirmations to executors or administrators, and for preparing bonds for administrators and attesting execution of bonds—an uniform fee of ..	£	s.	d.
	0	15	0

For Probates or Letters of Administration with or without Will annexed, under Seal,—including Double or Cessate Probates or Letters of Administration with or without Will annexed, de bonis non or cessate,—upon which Stamp Duty is payable in respect of the Personal Estate of the Testator or Intestate.

If the personal estate for or in respect of which stamp duty is payable is under or not exceeding—		If under or not exceeding—		£	s.	d.
£	£ s. d.	£30,000	.....	5	2	6
100	0 1 0	35,000	.....	5	8	9
200	0 2 0	40,000	.....	5	18	3
300	0 5 0	45,000	.....	6	7	6
450	0 8 0	50,000	.....	6	17	0
600	0 11 0	60,000	.....	7	6	3
800	0 15 0	70,000	.....	8	5	0
1,000	1 2 0	80,000	.....	9	3	9
1,500	1 10 0	90,000	.....	10	2	6
2,000	2 0 0	100,000	.....	11	1	3
3,000	2 10 0	120,000	.....	11	10	9
4,000	3 0 0	140,000	.....	12	9	6
5,000	3 2 6	160,000	.....	13	8	3
6,000	3 5 0	180,000	.....	14	7	0
7,000	3 7 6	200,000	.....	15	5	9
8,000	3 10 0	250,000	.....	16	4	6
9,000	3 12 6	300,000	.....	18	11	3
10,000	3 15 0	350,000	.....	20	18	3
12,000	3 17 6	400,000	.....	21	13	9
14,000	4 0 0	500,000	.....	22	9	6
16,000	4 3 9	And for every additional £100,000 or any fractional part of £100,000 on which stamp duty is payable, a further fee of				
18,000	4 7 6					
20,000	4 11 3					
25,000	4 16 3			1	11	3

45 & 46 VICT. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.] 45 & 46 Vict. c. 75.

WHEREAS it is expedient to consolidate and amend the act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the act of the thirty-seventh and thirty-eight Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1.—(1.) A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee. Married woman to be capable of holding property and of contracting as a feme sole.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

2. Every woman who marries after the commencement of this act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and Property of a woman married after the act to

45 & 46 Vict.
c. 75.

be held by
her as a
feme sole.

Loans by wife
to husband.

Execution
of general
power.

Property
acquired after
the act by
a woman
married be-
fore the act
to be held
by her as a
feme sole.

As to stock,
&c. to which
a married
woman is
entitled.

personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this act.

5. Every woman married before the commencement of this act shall be entitled to have and to hold, and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the commissioners for the reduction of the national debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the governor and company of the Bank of England, or of any other bank, which at the commencement of this act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the governor and company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married

woman, shall be sufficient *prima facie* evidence that she is 45 & 46 Vict.
beneficially entitled thereto for her separate use, so as to c. 75.
authorise and empower her to receive or transfer the same,
and to receive the dividends, interest, and profits thereof,
without the concurrence of her husband, and to indemnify the
postmaster-general, the commissioners for the reduction of
the national debt, the governor and company of the Bank of
England, the governor and company of the Bank of Ireland,
and all directors, managers, and trustees of every such bank,
corporation, company, public body, or society as aforesaid, in
respect thereof.

7. All sums forming part of the public stocks or funds, or As to stock
of any other stocks or funds transferable in the books of the &c. to be
Bank of England or of any other bank, and all such deposits transferred,
and annuities respectively as are mentioned in the last pre- &c. to a
ceding section, and all shares, stock, debentures, debenture married
stock, and other interests of or in any such corporation, com- woman.
pany, public body, or society as aforesaid, which after the
commencement of this act shall be allotted to or placed, regis-
tered, or transferred in or into or made to stand in the sole
name of any married woman shall be deemed, unless and
until the contrary be shown, to be her separate property, in
respect of which so far as any liability may be incident
thereto her separate estate shall alone be liable, whether the
same shall be so expressed in the document whereby her title
to the same is created or certified, or in the books or register
wherein her title is entered or recorded, or not.

Provided always, that nothing in this act shall require or
authorise any corporation or joint stock company to admit
any married woman to be a holder of any shares or stock
therein to which any liability may be incident, contrary to the
provisions of any act of parliament, charter, byelaw, articles
of association, or deed of settlement regulating such corpora-
tion or company.

8. All the provisions hereinbefore contained as to deposits Investments
in any post office or other savings bank, or in any other bank, in joint
annuities granted by the commissioners for the reduction of names of
the national debt or by any other person, sums forming part married
of the public stocks or funds, or of any other stocks or funds women and
transferable in the books of the Bank of England or of any others.
other bank, shares, stock, debentures, debenture stock, or
other interests of or in any such corporation, company, public
body, or society as aforesaid respectively, which at the com-
mencement of this act shall be standing in the sole name of a
married woman, or which, after that time, shall be allotted
to, or placed, registered, or transferred to or into, or made to
stand in, the sole name of a married woman, shall respectively
extend and apply, so far as relates to the estate, right, title,

45 & 46 Vict.
c. 75.

As to stock,
&c. standing
in the joint
names of a
married
woman and
others.

Fraudulent
investments
with money
of husband.

Moneys pay-
able under
policy of
assurance not
to form part
of estate of
the insured.

or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this act had not passed.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the

objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

45 & 46 Vict.
c. 75.13 & 14 Vict.
c. 60.

12. Every woman, whether married before or after this act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property

Remedies of
married
woman for
protection
and security
of separate
property.

45 & 46 Vict.
c. 75.

Wife's ante-
nuptial
debts and
liabilities.

claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this act shall operate to increase or diminish the liability of any woman married before the commencement of this act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this act, and to which she would not have been entitled for her separate use under the acts hereby repealed or otherwise, if this act had not passed.

Husband to
be liable for
his wife's
debts con-
tracted before
marriage to a
certain
extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this act contained shall operate to increase or diminish the liability of any husband married before the commencement of this act for or in respect of any such debt or other liability of his wife as aforesaid.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

45 & 46 Vict.
c. 75.
Suits for
ante-nuptial
liabilities.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this act, shall in like manner be liable to criminal proceedings by her husband.

Act of wife
liable to
criminal pro-
ceedings.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provi-

Questions
between
husband and
wife as to
property to
be decided in
a summary
way.

45 & 46 Vict.
c. 75.

sions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Married
woman as an
executrix or
trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Saving of
existing set-
tlements, and
the power to
make future
settlements.

19. Nothing in this act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Married
woman to be

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish,

the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

45 & 46 Vict.
c. 75.

liable to the
parish for the
maintenance
of her hus-
band.

31 & 32 Vict.
c. 122.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Married
woman to be
liable to the
parish for the
maintenance
of her chil-
dren.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such acts was in force, or any right or liability of any husband or wife, married before the commencement of this act, to sue or be sued under the provisions of the said repealed acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this act.

Repeal of
33 & 34 Vict.
c. 93.
37 & 38 Vict.
c. 50.

23. For the purposes of this act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal repre-
sentative of
married
woman.

24. The word "contract" in this act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this act includes a thing in action.

Interpretation
of terms.

- 45 & 46 Vict. c. 75. 25. The date of the commencement of this act shall be the first of January one thousand eight hundred and eighty-three.
- Commence-
ment of act. 26. This act shall not extend to Scotland.
- Extent of act. 27. This act may be cited as the Married Women's Property Act, 1882.
- Short title.

53 & 54 VICT. c. 29.

- 53 & 54 Vict. c. 29. *An Act to amend the Law by making better provision for the Widows of certain Intestates in the distribution of such Intestates' Property.* [25th July, 1890.]

BE IT ENACTED as follows :

- Intestate's estate not exceeding 500*l.* to belong to widow where no issue.
- Intestate's estate exceeding 500*l.*, widow to have a charge for 500*l.*
- How charge to be borne as between realty and personalty.
- Above provision to be in addition to share of residue.
- How realty to be valued.
1. The real and personal estates of every man who shall die intestate after the first day of September one thousand eight hundred and ninety leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively.
 2. Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of five hundred pounds the widow of such intestate shall be entitled to five hundred pounds part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such five hundred pounds, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment.
 3. As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively.
 4. The provision for the widow intended to be made by this act shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of five hundred pounds, in the same way as if such residue had been the whole of such intestate's real and personal estates and this act had not been passed.
 5. The net value of such real estates as aforesaid shall for the purposes of this act be estimated in the case of a fee simple upon the basis of twenty years purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the statute

sixteenth and seventeenth Victoria, chapter fifty-one, and in the case of an estate for a life or lives according to the said tables and rules. 53 & 54 Vict. c. 29.

6. The net value of such personal estate as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject. [Succession Duties Act, 1853.] How personally to be valued.

7. This act may be cited as the Intestates' Estates Act, 1890. Short title.

8. This act shall not extend to Scotland. Extent of act.

55 VICT.

An Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions. 55 Vict.

BE it enacted as follows:—

1. Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the courts of the United Kingdom, direct by Order in Council that this act shall, subject to any exceptions and modifications specified in the order, apply to that possession, and thereupon, while the order is in force, this act shall apply accordingly. Application of act by order in council.

2.—(1.) Where a court of probate in a British possession to which this act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a court of probate in the United Kingdom, be sealed with the seal of that court, and, thereupon, shall be of the like force and effect and have the same operation in the United Kingdom as if granted by that court. Sealing in United Kingdom of colonial probates and letters of administration.

(2.) Provided that the court shall, before sealing a probate or letters of administration under this section, be satisfied—

(a.) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom; and

(b.) in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate;

and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

55 Vict.

(3.) The court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom.

(4.) For the purposes of this section, a duplicate of any probate or letters of administration sealed with the seal of the court granting the same, or a copy thereof certified as correct by or under the authority of the court granting the same, shall have the same effect as the original.

(5.) Rules of court may be made for regulating the procedure and practice, including fees and costs, in courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this act applies. Such rules shall, so far as they relate to probate duty, be made with the consent of the Treasury, and subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

Application
of act to
British courts
in foreign
countries.

3. This act shall extend to authorise the sealing in the United Kingdom of any probate or letters of administration granted by a British court in a foreign country, in like manner as it authorises the sealing of a probate or letters of administration granted in a British possession to which this act applies, and the provisions of this act shall apply accordingly with the necessary modifications.

Orders in
council.

4.—(1.) Every Order in Council made under this act shall be laid before both Houses of Parliament as soon as may be after it is made, and shall be published under the authority of her Majesty's Stationery Office.

(2.) Her Majesty the Queen in Council may revoke or alter any Order in Council previously made under this act.

(3.) Where it appears to her Majesty in Council that the legislature of part of a British possession has power to make the provision requisite for bringing this act into operation in that part, it shall be lawful for her Majesty to direct by Order in Council that this act shall apply to that part as if it were a separate British possession, and thereupon, while the order is in force, this act shall apply accordingly.

Application
of act to
probates, &c.
already
granted.

5. This act when applied by an Order in Council to a British possession shall, subject to the provisions of the order, apply to probates and letters of administration granted in that possession either before or after the passing of this act.

Definitions.

6. In this act—

The expression "court of probate" means any court or authority, by whatever name designated, having jurisdic-

tion in matters of probate, and in Scotland means the sheriff court of the county of Edinburgh :

55 Vict.

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively :

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted :

The expression "British court in a foreign country" means any British court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any act or otherwise.

7. This act may be cited as the Colonial Probates Act, 1892. Short title.

RULES, ORDERS AND INSTRUCTIONS

FOR THE REGISTRARS OF THE PRINCIPAL REGISTRY OF HER MAJESTY'S COURT OF PROBATE,

*Made under the Provisions of the Statutes 20 & 21 Vict. c. 77, and
21 & 22 Vict. c. 95,*

IN RESPECT OF NON-CONTENTIOUS BUSINESS.

All rules, orders, and instructions heretofore made and issued for the Registrars of the Principal Registry of her Majesty's Court of Probate in respect of non-contentious business shall be repealed, on and after the first day of September, 1862, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules, orders, and instructions in respect of non-contentious business shall take effect on and after the first day of September, 1862.

Non-contentious
Business.

NON-CONTENTIOUS BUSINESS shall include all common form business as defined by the "Court of Probate Act, 1857," and the warning of caveats.

1. APPLICATION FOR PROBATE OR LETTERS OF ADMINISTRATION may be made at the Principal Registry in all cases.

2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration; but these latter applications will not be received by letter, nor through the medium of any agent.

3. The Registrars are not to allow probate or letters of administration to issue until all the inquiries which they may see fit to institute have been answered to their satisfaction. The Registrars are notwithstanding to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud.

AS TO PROBATE OF WILLS AND CODICILS AND LETTERS OF ADMINISTRATION WITH THE WILL OR [WILL AND CODICILS] ANNEXED, WHERE THE WILLS AND CODICILS ARE DATED AFTER 31ST DECEMBER, 1837.

Non-contentious
Business.

Execution of a Will.

4. *If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the Registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution were in fact complied with; and such affidavit must be engrossed and form part of the probate.*
—Repealed.

(a) In place of rule 4 of the rules, orders, and instructions for the Registrars of the Principal Registry in non-contentious business, it is ordered that—

4. If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the Registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution, were in fact complied with.

4a. The practice of registering affidavits shall be discontinued, and, in lieu thereof, a note signed by a Registrar shall be inserted on the engrossed copy will or codicil annexed to the probate or letters of administration, and registered, to the effect that affidavits of due execution, of domicile, or as the case may be, have been filed: Provided, that in cases presenting difficulty the affidavits themselves may still be registered by direction of a Registrar.

5. If on perusing the affidavits of both the subscribing witnesses it appear that the requirements of the statute were not complied with, the Registrars must refuse probate.

(a) Amended Rules and Orders for the Principal Registry in Non-contentious Business. Dated 14 Jan. 1871.

Forms of Notes to be used in the Principal Registry when applicable.

Affidavits of due execution filed.

A. B.,

Registrar.

Affidavits of identity of will (or codicil or memorandum) filed.

A. B.,

Registrar.

Affidavits of domicile and law filed.

A. B.,

Registrar.

Non-contentious
Business.

6. If on perusing the affidavit or affidavits setting forth the facts of the case it appear doubtful whether the will or codicil has been duly executed, the Registrars may require the parties to bring the matter before the Judge on motion.

7. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution.

Interlineations and Alterations.

8. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

9. When interlineations or alterations appear in the will (unless duly executed, or recited in, or otherwise identified by, the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

Erasures and Obliterations.

10. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.

11. In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.

Deeds, &c. referred to in a Will or Codicil.

12. If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent

part of the will, the production of such deed, paper, memorandum or other document must be required, with a view to ascertain whether it be entitled to probate; and, if not produced, its non-production must be accounted for.

Non-contentious
Business.

13. No deed, paper, memorandum or other document can form part of a will unless it was in existence at the time when the will was executed.

Appearance of the Paper.

14. If there are any vestiges of sealing wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required; and if not produced, its non-production must be accounted for.

Married Woman's Will.

15. In granting probate of a married woman's will made by virtue of a power or administration with such will annexed, the power under which the will purports to have been made must be specified in the grant.

[Repealed.
See Rule 15
of amended
Rules, 1887,
p. 692].

Codicils.

16. The above rules and orders respecting wills apply equally to codicils.

AS TO PROBATE OF WILLS, CODICILS, AND TESTAMENTARY PAPERS RELATING TO PERSONALTY, AND DATED BEFORE THE 1ST JANUARY, 1838.

Execution of a Will.

17. It is not necessary that a will, codicil, or testamentary paper dated before 1st January, 1838, should be signed by the testator or attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his will, codicil, or testamentary disposition must be clearly proved by circumstances.

18. A will, codicil, or testamentary paper, signed at the end of it by the testator and attested by two disinterested witnesses (although there be no clause of attestation) is *primâ facie* entitled to probate.

19. In cases where a will, codicil, or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark

Non-contentious
Business.

to the paper in the presence of one attesting witness, or produced it with his name already subscribed, or his mark already made, to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil, or testamentary disposition, or otherwise notified his intention that it should operate as such.

20. If the will, codicil, or testamentary paper is signed at the end of it by the testator but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

21. If the will, codicil, or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to show the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

22. The circumstance of a person being named as an executor in the will, codicil, or testamentary paper, or being interested as a legatee or as the husband or wife of a legatee under such will, codicil, or testamentary paper, rendered him or her incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the will, codicil, or testamentary paper, the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible, unless he or she shall first release his or her interest thereunder.

23. If an attestation clause, or the word "witnesses," appear written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a will, the copy of a will, or instructions for a will, it must *primâ facie* be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.

Appearance of Paper.

24. Any appearance of an attempted cancellation of a paper by burning, tearing, obliteration, or otherwise, and every circumstance leading to a presumption of abandonment or revocation of a paper on the part of the testator must be accounted for.

Alterations and Interlineations.

25. Alterations and interlineations made by the testator, if unattested, are to be proved by the affidavits of two persons

as to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st of December, 1837, are subject to the provisions of 1 Vict. c. 26.

Non-contentious
Business.

Deeds, &c. referred to in a Will or annexed to a Will.

26. With respect to deeds, papers, memoranda, or other documents mentioned in a testamentary paper, or appearing to have been annexed or attached thereto, the foregoing rules, orders, and instructions as to wills bearing date since the 31st December, 1837, will apply.

Republication by Codicil.

27. A will made before the 1st of January, 1838, is republished by a subsequent codicil thereto duly executed.

AS TO LETTERS OF ADMINISTRATION.

Notice to other Next of Kin.

28. Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the Registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin.

Limited Administrations.

29. LIMITED ADMINISTRATIONS are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge.

30. No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the Judge.

Administrations under Section 73.

31. Whenever the Court under sect. 73 appoints an administrator other than the person who prior to the "Court of Probate Act, 1857," would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

Non-contentious
Business.

Grants to an Attorney.

32. In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney, acting under a power of attorney.

Grants of Administration to Guardians.

33. Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin, or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with.

[No assignment necessary when grant is taken by the mother or her nominee.]

34. In cases of infants (*i. e.*, under the age of seven years) not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the Judge, or of one of the Registrars; the Registrar's order is to be founded on an affidavit, showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.

35. Where there are both minors and infants, the guardian elected by the minors may act for the infants, without being specially assigned to them by order of the Judge, or a Registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the Judge, or of a Registrar.

36. In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants.

Administrator's Oath.

37. The oath of administrators, and of administrators with the will, is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off, and the oath is to set forth, when the fact is so, that the party applying is the only next of kin, or one of the next of kin, of the deceased. In all administrations of a special character, the recitals in the oath, and in the letters of administration, must be framed in accordance with the facts of the case.

Administration Bonds.

Non-contentious
Business.

38. Administration bonds are to be attested by an officer of the Principal Registry, by a District Registrar, or by a Commissioner, or other person now or hereafter to be authorized to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the Principal Registry, must be attested by the same person who administers the oath to such administrator or administratrix.

39. In all cases of limited or special administration, two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of, or dealt with, by the administrator by means of the grant. The alleged value of such property is to be verified by affidavit, if required.

[Estate under
50*l*.—one
surety suffi-
cient.]

40. The administration bond is, in all cases of limited or special administrations, to be prepared in the Registry.

41. The Registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons.

Justification of Sureties.

42. When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the Registry, and the sureties to the administration bond must justify.

GENERAL RULES AND ORDERS FOR THE REGISTRARS OF THE
PRINCIPAL REGISTRY.

Time of issuing Grant.

43. No probate or letters of administration with the will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge, or by order of two of the Registrars.

44. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the Judge, or by order of two of the Registrars.

Non-contentious
Business.

45. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the Registrars. Should the certificate be unsatisfactory, the Registrars are to require such proof of the alleged cause of delay as they may see fit.

Filling up Grants.

46. All probates or letters of administration issued from the Principal Registry are to be filled up there.

Oath of Executors and Administrators.

47. The usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the Registry.

Identity of Parties.

48. The Registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

Testamentary Papers to be marked.

49. Every will, copy of a will, or other testamentary paper, to which an executor or administrator with the will is sworn, must be marked by such executor or administrator, and by the person before whom he is sworn.

Renunciations.

50. No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character.

Affidavits.

51. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent making it is to be inserted therein.

[See Amended
Rules of 1882,
p. 692.]

52. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

53. No affidavit will be admitted in any matter in the Court of Probate of which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure.

54. Where an affidavit is made by any person who is blind, or who, from his or her signature, or otherwise, appears to be

illiterate, the Registrar, Commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same, and that such person seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature, in the presence of the Registrar, Commissioner, or other authority before whom the affidavit was made.

Non-contentious
Business.

55. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a partner or clerk of his proctor, solicitor, or attorney.

56. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

57. In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose as to the mode in which the said will or codicil was executed and attested.

58. The Registrars are not to allow any affidavit to be filed (unless by leave of the Judge) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the Commissioner, or other person before whom it was sworn.

Caveats.

59. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the Principal Registry, or in a District Registry; if in the Principal Registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat book.

60. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time.

61. The Registrars shall, immediately upon a caveat being entered, send notice thereof to the District Registrar of any district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death.

62. No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in a District Registry.

Non-contentious
Business.

63. All caveats shall be warned from the Principal Registry. The warning is to be left at the place mentioned in the caveat as the address of the person who entered it.

64. It shall be sufficient for the warning of a caveat that a Registrar send by the public post a warning signed by himself, and directed to the person who entered the caveat, at the address mentioned in it.

65. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and is to contain an address within three miles of the General Post Office, at which any notice requiring service may be left. The form of warning will be supplied in the Registry.

66. Before any citation is signed by a Registrar, a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates, and notice thereof shall be sent to the District Registrar of any district in which the deceased appears to have resided at the time of his death.

67. In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, stating the manner of service and an affidavit of search for appearance and of non-appearance, must be filed.

Citations.

68. No citation is to issue under seal of the Court until an affidavit, in verification of the averments it contains, has been filed in the Registry.

69. Citations are to be served personally when that can be done. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do.

70. Citations and other instruments which cannot be personally served are to be served by the insertion of the same, or of an abstract thereof, settled and signed by one of the Registrars as an advertisement in such morning and evening London newspapers, and such local newspapers, and at such intervals as the Judge or one of the Registrars may direct.

Blind and Illiterate Testators.

71. The Registrars are not to allow probate of the will, or administration with the will annexed, of any blind or obviously illiterate or ignorant person, to issue, unless they have previously satisfied themselves that the said will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents.

Alterations in Grants, &c.

Non-contentious
Business.

72. Whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or any alteration is made in a grant, or a grant is revoked, and the volume of the printed calendar containing the entry of such grant has been forwarded to the District Registrars, notice of such re-swearing, alteration, or revocation is without delay to be forwarded by the Registrars of the Principal Registry to all the District Registrars.

[See Amended
Rule 72 of
1882, p. 692].

Irish Grants.

73. The seal is not to be affixed to any probate or letters of administration granted in Ireland, so as to give operation thereto as if the grant had been made by the Court of Probate in England, unless it appear from a certificate of the Commissioners of Inland Revenue, or their proper officer, that such probate or letters of administration is duly stamped in respect of the personal estate and effects of which the deceased died possessed in England. In respect to letters of administration, the provisions of statute 21 & 22 Vict. c. 95, s. 29, must also be complied with.

Grants for Property in the United Kingdom.

74. Whenever a grant of probate or of letters of administration is made under statute 21 & 22 Vict. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavit made for the Inland Revenue Office, that the testator or intestate died domiciled in England, and that he was possessed of personal estate in Scotland, other than that excluded by 22 & 23 Vict. c. 80, and the value of such personal estate must be separately stated in such affidavit. In case any portion of the personal estate be in Ireland, a separate affidavit and schedule must also be filed. Upon all such grants a note or memorandum must also be written and signed by one of the Registrars to the effect that the testator or intestate died domiciled in England.

Notices to Queen's Proctor.

75. In all cases where application is made for letters of administration (either with or without a will annexed) of the goods of a bastard dying a bachelor or a spinster, or a widower or widow without issue, or of a person dying without known relation, notice of such application is to be given to her Majesty's Procurator General (or in case the deceased died domiciled within the Duchy of Lancaster, to the solicitor for the duchy in London), in order that he may determine whether he will interfere on the part of the Crown; and no grant is to

Non-contentious
Business.

be issued until the officer of the Crown has signified the course which he thinks proper to take.

76. In the case of persons dying intestate without any known relation, a citation must be issued against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased, and the service thereof upon them shall be effected as required by Rule 70. Such citation must also be served upon the Queen's Proctor, or upon the solicitor for the Duchy of Lancaster, as the case may require.

Transmission of Papers.

77. After motions have been made before the Judge in Court, the Registrars are, on the application of the parties (unless the Judge shall otherwise direct), to transmit to a District Registrar the original papers and documents, in order that the grant of probate or administration may be completed in a District Registry.

78. Papers and other documents may be transmitted by the Registrars of the Principal Registry to the District Registrars through the post office. Such letters or packets are to be superscribed with the words, "On her Majesty's Service," and may be registered, if thought necessary.

Probate Copies of Wills.

79. *The Registrars are to take care that the copies of wills and affidavits to be annexed to the probate or letters of administration are fairly and properly written in the engrossing hand heretofore in use in the Prerogative Court, and are to reject those which are otherwise.*—Repealed.

(a) In place of Rule 79 of the rules and orders in non-contentious business, it is ordered, that—

79. The Registrars are to take care that the copies of wills and affidavits to be annexed to the probates or letters of administration are fairly and properly written, and are to reject those which are otherwise; but it shall not be necessary that such copies be written in the engrossing hand heretofore in use.

Office Copies.

80. Office copies of wills, and other documents furnished in the Principal Registry, will not be collated with the original will or other document, unless specially required. Every copy so required to be examined, shall be certified under the hand of one of the Registrars of the Principal Registry, to be an examined copy.

(a) Amended Rules and Orders for the Principal Registry in Non-Contentious Business. Dated 14th Jan. 1871.

81. The seal of the Court is not to be affixed to any office copy of a will, or other document, unless the same has been certified to be an examined copy. Non-contentious
Business.

Attendances with Documents.

82. If a will or other document filed in the Registry is required to be produced at any place within three miles of the Principal Registry, application must be made for that purpose not later than the day previously to that named for its production.

83. If a will or other document filed in the Registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place, and in every case such notice must be given (except by special leave of the Judge or Registrars) at least twenty-four hours before the clerk in whose charge the will or other document is to be placed will be required to set off.

Subpœnas to bring in Testamentary Papers.

84. Any person bringing in a will or testamentary paper, in obedience to a subpœna, is to take it in the first instance to the clerk of the papers, who will prepare a minute to be signed by the Registrar to whom the will or paper brought in is to be delivered, and the Registrar will sign the minute recording the delivery thereof.

85. The minute is to be entered in the book of Registrar's minutes in the usual manner; and the fee for the entry, and a further fee for filing each testamentary paper, will then be payable. If these fees should not be paid by the person bringing in the will or paper, the same are to be charged to the person who may first apply to the clerk of the papers to make use of the will or paper so brought in. In case the person bringing in a will or testamentary paper may desire to have a voucher for its delivery into the Registry, he may take an office copy of the minute on paying the usual fee for the same.

86. Any person served with a subpœna to bring in a testamentary paper, is at liberty to enter an appearance on payment of the usual fees, if he thinks fit to do so.

Time allowed for appearing to a Warning, Citation, or Subpœna.

87. The time fixed by a warning or citation for entering an appearance or by a subpœna, to bring in a testamentary paper, shall, in all cases, be exclusive of Sundays, Christmas Day, and Good Friday.

Non-contentious
Business.

TAXING BILLS OF COSTS.

88. Any bill of costs may be referred to the Registrars of the Principal Registry for taxation, and no special order shall hereafter be required for the purpose.

89. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner, and the Registrar shall decide in each case what may be a sufficient notice.

90. When an appointment has been made by a Registrar to tax a bill, the Registrar may proceed to tax the same after the expiration of a quarter of an hour, notwithstanding the absence of either party, or his agent, provided he be satisfied that the absent party has had due notice of the appointment for taxation.

91. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

AMENDED RULES AND ORDERS

FOR THE REGISTRARS OF THE PRINCIPAL PROBATE REGISTRY
AND FOR THE DISTRICT PROBATE REGISTRARS IN RESPECT
OF NON-CONTENTIOUS BUSINESS.

To take effect on and after the 26th day of May, 1882.

Rules 52, 53, and 72 of the Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry in respect of non-contentious business, dated 30th July, 1862, and Rules 65 and 66 of the Rules, Orders, and Instructions for the District Probate Registrars, dated the 27th January, 1863, are respectively repealed, save so far as concerns anything done or proceeding taken in accordance with them, and in place of the said Rules it is ordered that the following Rules shall take effect:—

IN THE PRINCIPAL PROBATE REGISTRY.

52. In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

53. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall, without leave of

the court or of one of the Registrars, be filed or made use of in any matter depending in the Probate Court or Registry, unless the interlineation or alteration other than by erasure is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

72. When any alteration is made in a grant of probate or letters of administration which has issued from a District Probate Registry, or when any such a grant is revoked and the volume of the printed calendar containing the entry of the grant has been forwarded to the District Registrars, notice of such alteration or revocation is without delay to be forwarded by the Registrars of the Principal Registry to the District Probate Registrar from whose Registry the altered or revoked grant issued.

IN THE DISTRICT PROBATE REGISTRIES.

65. In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

66. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall be filed or made use of, unless the interlineation or alteration other than by erasure is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

AMENDED RULES, ORDERS, & INSTRUCTIONS

FOR THE REGISTRARS OF THE PRINCIPAL PROBATE REGISTRY
AND FOR THE DISTRICT PROBATE REGISTRARS, IN NON-
CONTENTIOUS BUSINESS.

To take effect on and after the 19th day of April, 1887.

Rule 15 of the Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry in Non-contentious Business, dated 30th July, 1862, and Rule 18 of the Rules, Orders, and Instructions for the District Probate Regis-

Non-contentious
Business.

trars in such business, dated the 27th January, 1863, are respectively repealed, save so far as concerns anything done or proceeding taken in accordance with them, and in place of the said Rules it is ordered that the following Rules shall take effect:—

Rules 15 and 18. In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor or other person authorised in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next-of-kin of the testatrix in case of a partial intestacy.

The forms of instruments annexed to the before-mentioned Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry, numbered 12, 13, and 14, and in the Rules, Orders, and Instructions for the District Probate Registrars, numbered 13, 14, and 15, and thereby directed to be adopted as nearly as the circumstances of the case will allow in respect of the wills of married women, shall cease to be adopted in respect of such wills, except so far as the same may be applicable to oaths sworn before these Rules and Orders take effect, and also except so far as the same may be applicable to any second or subsequent grants required to complete the representation in cases where limited or special grants have already issued.

FORMS OF INSTRUMENTS

To be adopted in the PRINCIPAL REGISTRY of the Probate Division, as nearly as the circumstances of each case will allow.



No. 1.—A. Affidavit or Affirmation for the Commissioners of Inland Revenue.*

Non-contentious
Business.

[This form should be used in *all* cases *except* when the whole personal estate wherever situate and without deducting debts or funeral expenses does not exceed the value of 100*l.* so that no stamp duty is payable, or when a stamp duty of 30*s.* is to be impressed under the provisions of sect. 33 of the Act 44 Vict. c. 12.

A stamp duty of 30*s.* can be impressed only in the case of a person dying on or after the 1st June, 1881, whose whole personal estate wherever situate and without deducting debts or funeral expenses exceeds the value of 100*l.*, but does not exceed the value of 300*l.*]

No. 2.—B. Affidavit or Affirmation for the Commissioners of Inland Revenue.*

[This form should *only* be used when the whole personal estate wherever situate and without deducting debts or funeral expenses does not exceed the value of 100*l.* so that no stamp duty is payable, or when a stamp duty of 30*s.* is to be impressed under the provisions of sect. 33 of the Act 44 Vict. c. 12.

A stamp duty of 30*s.* can be impressed only in the case of a person dying on or after the 1st June, 1881, whose whole personal estate wherever situate and without deducting debts or funeral expenses exceeds the value of 100*l.* but does not exceed the value of 300*l.*]

* These forms are provided by the Government, and can be obtained—gratis—at the Probate Registries and most Post Offices.

No. 3.—Affidavit or Affirmation for the Commissioners of Inland Revenue in cases where the Deceased left no Personal Estate in this Country.

In the High Court of Justice in England. Probate, Divorce, and Admiralty Division.

(Probate.)

The Principal Registry.

In the goods of _____, deceased.

(¹)

(¹) Insert here "I" or "We," and the name, address, and description of each person who joins in the affidavit or affirmation.

(²) Insert here "make oath" or "solemnly affirm," as the case may be.

(³) Insert here "probate of the will," or "ad-

(²) _____ and say as follows:—

1. _____ desire to obtain a grant of (³) _____

of _____

- Non-contentious Business.
- ministration with the will annexed of the personal estate and effects," or "administration of the personal estate and effects," as the case may be.
- (4) Insert here the address and occupation of the deceased and also the description, as "bachelor," "widower," "widow," or "spinster."
- (5) Insert here the name of the country of the domicile.
- (6) Insert here "also" or "no" according as deceased did or did not leave real estate.
- (7) Insert here "sworn" or "affirmed" as the case may be and the name of each deponent.
- late of ⁽⁴⁾ deceased, who died at on the day of
 one thousand eight hundred and domiciled in ⁽⁵⁾ .
2. The account hereto annexed, is a true account of the particulars and present value of all the personal estate and effects of the deceased, for or in respect of which the grant is to be made, exclusive of what the deceased may have been possessed of or entitled to as a trustee and not beneficially. The gross value thereof altogether is £. , and the whole of the said personal estate and effects was situate abroad at the time the deceased died.
3. The deceased had ⁽⁶⁾ real estate in this country.
4. The deceased left widow lawful issue surviving.
5. The deceased left no personal or moveable estate and effects within the United Kingdom at the time of his death.
- All which is true to the best of knowledge and belief.
 (7) by the above-named at on the day
 of 18 . Before me,
 (7) by the above-named at on the day
 of 18 . Before me,
 ACCOUNT.
- Personal estate in respect of which the grant is to be made.
- Personal property situate abroad at the time of the death of the deceased, but since remitted to this country where he was domiciled for distribution, viz. :—
- (1) Insert here "Principal" or "District" as is required, and in the latter case add the name of the district.
- (2) Insert here "I" or "We" and the name, address, and description of each person who joins in the affidavit or affirmation.
- (3) Insert here "make oath" or "solemnly affirm," as the case may be.
- (3a) Insert here "I" or "We," as the case may be.
- (4) Insert here "Probate of the will," or "Administration with the will annexed of the personal estate and effects," or "Administration of the personal estate and effects," as the case may be.
- (5) If deceased were domiciled abroad insert here the name of the country, and strike out the rest of the paragraph.
- (6) If application for the grant is made to the principal registry, strike out the rest of the paragraph.
- (7) Insert here "sworn" or "affirmed," as the case may be, and the name of each deponent.
- No. 4.—*Affidavit or Affirmation for the Commissioners of Inland Revenue in all cases where the Deceased was merely a Trustee and had no Personal Estate of his own.*
- In the High Court of Justice in England. Probate, Divorce, and Admiralty Division.
- (Probate.) The ⁽¹⁾ Registry .
 In the goods of , deceased.
 (2)
 (3) and say as follows :—
 1. (3a) desire to obtain a grant of ⁽⁴⁾ of , late
 of , deceased, who died at on the day of
 one thousand eight hundred and domiciled in ⁽⁵⁾ that
 part of the United Kingdom called ⁽⁶⁾ and having a fixed
 place of abode at within the district of .
 2. The account hereto annexed is a true account of the particulars and present value of all the personal estate and effects of the deceased, for or in respect of which the grant is to be made. The gross value thereof altogether is £ and the said deceased was legally entitled thereto as a trustee only and had no beneficial interest therein.
- All which is true to the best of knowledge and belief.
 (7) by the above-named at on the day
 of 18 . Before me,
 (7) by the above-named at on the day
 of 18 . Before me,
 ACCOUNT.
- Personal estate in respect of which the grant is to be made.

No. 5.—*Affidavit of Attesting Witness in proof of the due Execution of a Will or Codicil dated after 31st December, 1837.*

Non-contentious
Business.

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

I, C. D., of ⁽¹⁾ make oath [or solemnly, sincerely and truly declare and affirm, according to the form of words prescribed by the statute applicable to the particular case], that I am one of the subscribing witnesses to the last will and testament [or codicil, as the case may be] of A. B., late of in the county of deceased, the said will [or codicil] being now hereunto annexed, bearing date and that the said testator executed the said will [or codicil] on the day of the date thereof, by signing his name at the foot or end thereof [or in the testimonium clause thereof, or in the attestation clause thereto, or as the case may be], as the same now appears thereon, in the presence of me and of the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will [or codicil] in the presence of the said testator.

(1) Insert the names, residence and title, or addition of the deponent.

N.B. If the signature is in the testimonium clause or attestation clause, insert "meaning and intending the same for his final signature to his will."

(Signed) C. D.

Sworn at on the day of 18 .

Before me,

[person authorized to administer oaths in the Supreme Court.]

No. 6.—*Affidavit of Attesting Witness verifying Alterations in a Will or Codicil.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of deceased.

I of make oath and say that I am one of the subscribing witnesses to the* last will and testament of late of deceased, the said† being now hereunto annexed, bearing date day of 18 .

And further I make oath and say that I have carefully perused and inspected the said and have particularly observed

[The words " " interlined between the and lines of the first side or page of the said will, the name " " interlined between the and lines of the said first side or page the words and figures " " struck through in ink in the line of the second side or page of the said will, and the word " " written upon an erasure in the line of the said second side or page, or, as the case may be, (taking care to describe accurately the various interlineations, alterations, obliterations, or erasures, in the order in which they appear in the document).]

In the case of Quakers, say, "being one of the people called Quakers, do solemnly, sincerely, and truly declare and affirm."

*Or codicil to the
†Will or codicil.

And I further make oath and say, that the said testat executed the said ‡ on the day of the date thereof, by signing ‡ Will or codicil.

Non-contentious
Business.

*At the foot or end thereof; or "in the testimonium clause thereof;" or "in the attestation clause thereto;" [or as the case may be].

(a) Interlineations, alterations, obliterations, or erasures [as the case may be].

+Will or codicil.

h name* as the same now appears thereon, in the presence of me and of the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said in the presence of the said testat .
And I further make oath and say that the said recited (a) were written and made in the said† previously to the execution thereof.

Sworn at on the day of 189 .
Before me,

A Commissioner to administer Oaths in
the Supreme Court of Judicature.

No. 7.—*Affidavit of Handwriting.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.) The Principal Registry.

*Or solemnly affirm.

*make oath that I knew and was well acquainted with late of in the county of deceased, who died on the day of at , for many years before and down to the time of h death, and that during such period I have frequently seen h write and also subscribe h name to writings, whereby I have become well acquainted with h manner and character of handwriting and subscription, and having now with care and attention perused and inspected the paper writing hereunto annexed, purporting to be and contain the last will and testament of the said deceased, beginning thus " " and ending thus " " and being subscribed thus " ."

Include in these recitals
the date of the will.

Oath or affirmation.

And further make oath that verily and in conscience believe the whole body, series and contents of the said will , together with the names subscribed thereto as aforesaid, to be of the true and proper handwriting and subscription of the said deceased.

On the day of 189 , the said was duly
sworn at to the truth of this affidavit.
Before me

No. 8.—*Affidavit as to British Status of a Testator to prove his Will good under the provisions of the 1st Section of the 24th and 25th Vict. cap. 114.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.) The Principal Registry.

Names, residence, and
description of deponent.

One of the executors, or
the sole executor.

Or "late of" only.

It is necessary to show
whether will was executed in or out of the
United Kingdom.

In the goods of deceased.

I of make oath and say as follows:—

1. I am named in the last will and testament of
formerly of but late of deceased, now hereunto
annexed, bearing date the day of 18 .

2. That the said will was duly executed by the said deceased
at .

3. The said deceased was a British subject,* and was born of English parents at in the county of , and his domicile of origin was English (a).

Sworn on the day of 189 .
Before me .

Non-contentious
Business.

* If proved under the 2nd section of the Act, omit from this.

No. 9.—*Certificate of Reason of Delay.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of deceased of the solicitor for the party applying for a grant of * of the said late of deceased, do hereby certify that the reason why the said has not sooner applied for the said grant is that (a)

(a) The only property which the deceased died possessed of or entitled to consisted of the sum of bequeathed to him by the will of proved (1) subject to the life interest of who died last, and that the said grant is required to enable the said to give a legal discharge for the said sum, and for no other purpose whatever—or as the case may be.

Dated the day of 189 .

(1) Give date and place of grant.

Solicitor.

"I" or "We."

Insert name and address of solicitor.

* "Letters of administration of the personal estate and effects," or, "Probate of the will," or, "Letters of administration, with the will annexed, of the personal estate and effects."

Same description as in oath.

To be signed by the practitioner extracting the grant.

No. 10.—*Identity of Executors.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

Principal Probate Registry.

In the goods of A. B., deceased.

I, Charles John Smith, of, &c., make oath and say, that A. B., late of, &c., by his last will and testament, bearing date the day of 1892, appointed John Smith, of, &c., sole executor.

That at the date of the said will I was the only person of the name of Smith residing at [the address mentioned in the will].

That I have been intimately acquainted with the said deceased for years, and [insert particulars showing that the deponent was the person intended to be the executor].

Sworn at, &c.

No. 11.—*Affidavit as to Copies of Wills from Books of Council and Session, when no Confirmation granted.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

I, C. D., of make oath and say as follows:—

1. I have referred to the will, &c., registered in the books of If domiciled in England

(a) If this affidavit is made by an attesting witness, he must speak to the due execution of the will.

Non-contentious
Business.

and will to be proved according to English law, omit clause 1.

council and session, and of which will, &c., official extracts are now hereunto annexed, and I say that the said will, &c., are made in conformity with and are valid by the laws and constitutions of Scotland.

2. And I say that the official extracts hereunto annexed are, by the said laws and constitutions, equivalent in all respects to the originals, and are received in all Courts in Scotland as making faith in judgment equally with the originals, and that confirmation is granted by the Commissary Court of Scotland upon production of such extracts.

Sworn, &c.

(Signed) C. D.

No. 12.—*Declaration of the Personal Estate and Effects of a Testator or an Intestate.*

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

A true declaration of all and singular the personal estate and effects of A. B., late of _____, deceased, who died on the _____ day of _____ at _____ which have at any time since his death come to the hands, possession or knowledge of C. D., the intended administrator with the will [or administrator of the said estate and effects] of the said A. B., made and exhibited upon and by virtue of the corporal oath [or solemn affirmation] of the said C. D., follows, to wit :

First, this declarant declares that the said deceased	£	s.	d.
was at the time of his death possessed of or entitled to			
[The details of the deceased's effects must be here inserted, and the value inserted opposite to each particular.			

Household goods, furniture, plate, linen, china, jewellery and trinkets, &c., may be described in general terms, the name and address of the licensed appraiser who valued them being added.

Where leasehold estates are described briefly, it will be necessary to state the valuation. But if they are described particularly, the valuation will not be required.

Policies of insurance and mortgages must be sufficiently described to identify them.]

Lastly, this declarant saith, that no personal estate or effects of or belonging to the said deceased have at any time since his death come to the hands, possession or knowledge of this declarant, save as is hereinbefore set forth.

(Signed) C. D.

The affirmation must be made according to the form of words prescribed by the statute applicable to the particular case.

On the _____ day of _____ 18 _____ the said C. D. was duly sworn to [or being _____ solemnly, sincerely and truly declared and affirmed,] the truth of the above declaration, at _____ in the county of _____.

Before me,

[person authorized to administer oaths in the Supreme Court.]

No. 13.—*Justification of Sureties.*Non-contentious
Business.In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

We, C. D. of , and E. F. of , jointly and severally make oath [*or solemnly, sincerely, and truly declare and affirm, according to the form of words prescribed by the statute applicable to the particular case*], that we are the proposed sureties on behalf of G. H., the intended administrator of all and singular the personal estate and effects of the said A. B., late of deceased, in the penal sum of pounds, for his faithful administration of the said personal estate and effects of the said deceased; and I the said C. D. for myself further make oath [*or as before*] that I am, after payment of all my just debts, well and truly worth in real and personal estate the sum of ; and I, the said E. F. for myself further make oath [*or as before*] that I am, after payment of all my just debts, well and truly worth in real and personal estate the sum of pounds.

Sworn by the said C. D. and E. F. at on the day
of 18 .

Before me,

[*person authorized to administer oaths in the Supreme Court.*]No. 14.—*Election by Minors of a Guardian.*In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

WHEREAS A. B., late of in the county of deceased, died on or about the day of 18 , at intestate, a widower, leaving C. D., E. F., and G. H., his natural and lawful and only children, the said C. D. being a minor of the age of twenty years only; the said E. F. being also a minor of the age of nineteen years only; and the said G. H. being an infant of the age of six years only:

Now we, the said C. D. and E. F., do hereby make choice of and elect K. L., our lawful maternal uncle [*or as the case may be*] and one of our next of kin, to be our curator or guardian, for the purpose of his obtaining letters of administration of the personal estate and effects of the said A. B., deceased, to be granted to him for our use and benefit, and until one of us shall attain the age of twenty-one years [*or for the purpose of renouncing for us, and on our behalf, all our right, title, and interest to and in the letters of administration, &c., as the case may be*] [*add, in cases where a solicitor appears for the minors*], and we hereby appoint M. N. of our solicitor, to file, or cause to be filed, this our election for us in the Principal Probate Registry of the Probate, Divorce and Admiralty Division of the High Court of Justice.

IN WITNESS whereof we have hereunto set our hands and seals this day of in the year 18 .

C. D. (L.S.)

E. F. (L.S.)

Signed, sealed and delivered by the within-named C. D. and
E. F., in the presence of

[*One disinterested witness sufficient.*]

Non-contentious
Business.

No. 15.—*Renunciation of Probate and Administration with the Will annexed.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

WHEREAS A. B., late of in the county of deceased,
died on the day of 18 , at and whereas he made
and duly executed his last will and testament [*or will and testa-*
ment with a codicil thereto] bearing date the day of
18 ⁽¹⁾, and thereof appointed C. D. executor and residuary legatee
in trust [*or as the case may be*]:

⁽¹⁾ If there are codicils,
their dates should be
also inserted.

Now I, the said C. D., do hereby declare, that I have not inter-
meddled in the personal estate and effects of the said deceased,
and will not hereafter intermeddle therein, with intent to defraud
creditors, and I do hereby expressly renounce all my right and
title to the probate and execution of the said will [*and codicils, if*
any], and to the letters of administration with the said will [*and*
codicils, if any] annexed, of the personal estate and effects of the
said deceased.

IN WITNESS whereof I have hereto set my hand and seal this
day of 18 .

C. D. (L.S.)

Signed [sealed and delivered] by the said C. D. in the
presence of G. H.

[*One disinterested witness sufficient.*]

No. 16.—*Renunciation of Administration.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

WHEREAS A. B., late of in the county of deceased,
died on the day of 18 , at intestate, a widower;
and whereas I, C. D., am his natural, lawful and only child [*or as*
the case may be]:

This to be varied so as
to show the kindred or
interest of the person
renouncing.

Now I, the said C. D., , do hereby expressly renounce all
my right and title to the letters of administration of the personal
estate and effects of the said deceased [*add in cases where a solicitor*
is to appear for the person renouncing], and I hereby appoint E. F.,
of my solicitor, to file, or cause to be filed, this renunciation
for me in the Principal Probate Registry of the Probate, Divorce
and Admiralty Division of the High Court of Justice.

IN WITNESS whereof I have hereto set my hand and seal this
day of 18 .

C. D. (L.S.)

Signed, sealed and delivered by the said C. D., in the
presence of G. H.

[*One disinterested witness sufficient.*]

No. 17.—*Additional Affidavit and Schedule for the Commissioners of the Inland Revenue when part of the Personal Estate consists of Property in Ireland.*

Non-contentious
Business.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

(Probate.)

The Principal Registry.

I, A. B., of an executor [or A. B., of and C. D., of executors] named in the last will and testament with codicils, [or the party or parties applying for letters of administration with the will and codicils annexed, of the personal estate and effects] of E. F. (*the testator*), late of who died on the day of 18, at [or, in cases of intestacy, in order to the due administration of the personal estate and effects of G. H. (*the intestate*), late of who died on the day of 18, at intestate], make oath and say; [or, in the case of Quakers or other affirmants, do or doth solemnly, sincerely, and truly declare and affirm] that ha made diligent search and due inquiry after and in respect of the personal estate and effects of the said deceased in Ireland, in order to ascertain the full amount and value thereof; and that to the best of knowledge, information, and belief, the whole of the personal estate and effects, rights and credits, of which the said deceased died possessed in Ireland, consisting of the property, moneys, securities, matters, and things specified in the account annexed to this affidavit [or affirmation] are under the value of £ exclusive of what the deceased may have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, and without deducting anything on account of the debts due and owing from the deceased.

Sworn at in the county of (Signed) A. B.
of 18 on the day

Before me,
[person authorized to administer oaths in the Supreme Court.]

An Account of the Estate and Effects of

	Price of Stocks.	£ s. d.
Household goods, linen, wearing apparel, books, plate, jewels, &c.		
Property in the stocks or funds transferable at the bank.		
Leasehold property		
Property in public companies		
Money out on mortgage and other securities ..		
Real estate devised to be sold, or value of legacies charged on real estate.		
Stock in trade, farming stock, and implements of husbandry.		
Other personal property not comprised under the foregoing heads.		

Non-contentious
Business.

No. 18.—*Subpœna in a Proceeding in Common Form to bring in a Script.*

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

(Probate.)

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of .

WHEREAS it appears by an affidavit of sworn on the day of and filed in the Principal Probate Registry of the Probate, Divorce and Admiralty Division of the High Court of Justice, that a certain original paper or script, being or purporting to be testamentary, to wit [*here describe the paper*], bearing date the day of 18 , is now in your possession, within your power, or under your control:

NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Division [*or the district registry attached to our said Division at*] the said original paper or script now in the possession, within the power, or under the control, of you the said , And this you shall in nowise omit under pain of the law and the contempt thereof. Witness [*insert the name of the President*], at the Probate, Divorce and Admiralty Division of the High Court of Justice, the day of 18 , in the year of our reign.
(Signed) E. F.,
Registrar.

Indorsement to be made of the Service.

This subpœna was served by G. H. on of on the day of 18 , at .
(Signed) G. H.

No. 19.—*Affidavit of Handwriting.*

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

I, C. D., of in the county of make oath [*or solemnly, sincerely and truly declare and affirm, according to the form of words prescribed by the statute applicable to the particular case*], that I knew and was well acquainted with A. B., late of in the county of deceased, who died on the day of at for many years before and down to the time of his death, and that during such period I have frequently seen him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription, and having now with care and attention perused and inspected the paper writing hereunto annexed, purporting to be and contain the last will and testament of the said deceased, bearing date beginning thus ending thus and being subscribed thus "A. B." [*or as the case may be*]; I further make oath, that I verily and in my conscience believe the whole body, series and contents of the said will,

together with the names "A. B." subscribed thereto as aforesaid [or as the case may be], to be of the true and proper handwriting and subscription of the said "A. B." deceased.

Non-contentious
Business.

(Signed) C. D.
Sworn at on the day of 18 .

Before me,
G. H.

[person authorized to administer oaths in the Supreme Court.]

No. 20.—*Affidavit of Plight and Condition and Finding.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

In the goods of A. B., deceased.

I, C. D., of in the county of make oath [or solemnly, sincerely, and truly declare and affirm, according to the form of words prescribed by the statute applicable to the particular case], that I am the sole executor named in the paper writing now hereunto annexed, purporting to be and contain the last will and testament of A. B., late of in the county of deceased, who died on the day of at the said will bearing date the day of and having viewed and perused the said will and particularly observed [here recite the various obliterations, interlineations, erasures, and alterations (if any), or describe the plight and condition of the will, or any other matters requiring to be accounted for, and set forth the finding of the will in its present state, and, if possible, trace the will from the possession of the deceased in his lifetime up to the time of making the affidavit], I the deponent lastly make oath that the same is now in all respects in the same state, plight and condition as when found [or as the case may be] by me as aforesaid.

(Signed) C. D.
Sworn at on the day of 18 .

Before me,
G. H.

[person authorized to administer oaths in the Supreme Court.]

No. 21.—*Affidavit of Search.*

In the High Court of Justice. Probate, Divorce, and Admiralty
Division.

(Probate.)

The Principal Registry.

I, C. D., of in the county of make oath [or solemnly, sincerely and truly declare and affirm, according to the form of words prescribed by the statute applicable to the particular case], that I am the sole executor named in the paper writing hereunto annexed, purporting to be and contain the last will and testament of A. B., late of deceased, who died on the day of in the year 18 , at the said will beginning thus " ,", ending thus "In witness whereof I have hereunto set my hand this day of in the year of our Lord one thousand eight hundred and fifty-four" [or as the case may be], and being thus

This form of affidavit to be used when it is shown by affidavit that neither the subscribed witnesses nor any other person can depose to the precise time of the execution of the will.

has, and if under a will or codicil, set forth the date thereof, and give an address within three miles of the general post office, at which notices requiring service may be left.]

Non-contentious
Business.

Indorsement to be made after Service.

This warning was served by I. K. on A. B., of [or on C. D., of the solicitor] by whom the caveat was entered at [here state how the service was effected] on the day of 18 .

(Signed) I. K.



FORMS OF JURAT.

If one deponent only—

Sworn at on the day of 18 .
Before me,



If more than one deponent—

Sworn by the said and [give the christian and sur-
names of each deponent] at on the day of 18 .

Or by both the above-named deponents.

Before me,



If the deponent be a marksman—

Sworn by the said at on the day of 18 , this affidavit having been first read over to him [or her], who seemed perfectly to understand the same, and made his [or her] mark thereto in my presence,
Before me,



N.B.—In all cases of affirmation, the exact words prescribed by the statute applicable to the particular case must be used, and none other will be received.

ALTERATION OF FEES

Directed to be taken in the Principal Registry of the Court of Probate.

On the 1st day of April, 1863, the Table of Fees to be taken in the Principal Registry of her Majesty's Court of Probate in Non-contentious Business, and published in the London Gazette of the 15th day of August, 1862, shall be altered by erasing so much of the same as directs that—

For every copy of a will made for the Inland Revenue Office the sum of 6*d.* per folio of ninety words shall be taken; and that,

For every abstract of an administration act for the Inland Revenue Office the sum of 3*s.* 3*d.* shall be taken; and from that day no payment shall be received from the Inland Revenue Office for such copies and abstracts.

(Signed) WESTBURY, C.
A. E. COCKBURN, C. J.
C. CRESSWELL,

RULES, ORDERS AND INSTRUCTIONS
FOR THE DISTRICT REGISTRARS OF HER MAJESTY'S
COURT OF PROBATE.

*Made under the Provisions of the Statutes 20 & 21 Vict. c. 77,
and 21 & 22 Vict. c. 95,*

IN RESPECT OF

NON-CONTENTIOUS BUSINESS.

All rules, orders and instructions heretofore made and issued for the District Registrars of her Majesty's Court of Probate in respect of non-contentious business shall be repealed, on and after the second day of March, 1863, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules, orders and instructions in respect of non-contentious business shall take effect on and after the second day of March, 1863.

NON-CONTENTIOUS BUSINESS shall include all common form business as defined by the "Court of Probate Act, 1857," and the warning of caveats.

Non-contentious
Business.

1. APPLICATION FOR PROBATE OR LETTERS OF ADMINISTRATION may be made at the Principal Registry in all cases. Application may also be made at a District Registry in cases where the deceased, at the time of his death, had a fixed place of abode within the district in which the application is made, and not otherwise.

2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration.

3. The District Registrar, before he entertains any application for probate or letters of administration, must ascertain that the deceased had, at the time of his death, a fixed place of abode within his district.

4. The District Registrar is not to allow probate or letters of administration to issue until all the inquiries which he may see fit to institute have been answered to his satisfaction, and

Non-contentious
Business.

this refers more particularly to applications made in person by executors and others. The District Registrar is notwithstanding to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud.

5. No District Registrar or clerk in a District Registry shall directly or indirectly transact business for himself or as the proctor or solicitor of any other person in the District Registry to which he has been appointed.

AS TO PROBATE OF WILLS AND CODICILS AND LETTERS OF ADMINISTRATION, WITH THE WILL [OR WILL AND CODICILS] ANNEXED, WHERE THE WILLS AND CODICILS ARE DATED AFTER 31ST DECEMBER, 1837.

Execution of a Will.

6. Upon receiving an application for probate or letters of administration with the will annexed, the District Registrar must inspect the will and each codicil, and see whether by the terms of the attestation clause (if any) it is shown that the same have been executed in accordance with the provisions of statutes 1 Vict. c. 26, and 15 Vict. c. 24.

7. *If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the District Registrar must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution were in fact complied with; and such affidavit must be engrossed and form part of the probate.*—Repealed.

(a) In place of Rule 7 of the Rules, Orders and Instructions for the District Registrars of her Majesty's Court of Probate, it is ordered that—

7. If there be no attestation clause to a will or codicil pre-

(a) Amended Rules and Orders for the District Registrars of her Majesty's Court of Probate in respect of Non-contentious Business. Dated 14th January, 1871.

Forms of Notes to be used in the District Registries when applicable.

Affidavits of due execution filed.

C. D., District Registrar.

Affidavits of identity of will (or codicil or memorandum) filed.

C. D., District Registrar.

Affidavits of domicile and law filed.

C. D., District Registrar.

sented for probate, or if the attestation clause thereto be insufficient, the District Registrar must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution were in fact complied with.

Non-contentious
Business.

7a. The practice of registering affidavits shall be discontinued, and, in lieu thereof, a note signed by the District Registrar shall be inserted on the engrossed copy will or codicil annexed to the probate or letters of administration, and registered, to the effect that affidavits of due execution, of domicile, or as the case may be, have been filed: Provided, that in cases presenting difficulty the affidavits themselves may still be registered with the consent of a Registrar of the Principal Registry.

8. If on perusing the affidavits of both the subscribing witnesses it appear that the requirements of the statute were not complied with, the District Registrar must refuse probate.

9. If on perusing the affidavit or affidavits, setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, the District Registrar must transmit a statement of the matter to the Registrars of the Principal Registry, who may require the parties to bring the matter before the Judge on motion.

10. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil: but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution.

Interlineations and Alterations.

11. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

12. When interlineations or alterations appear in the will (unless duly executed, or recited in or otherwise identified by the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are but of small importance, and are evidenced by the initials of the attesting witnesses.

Non-contentious
Business.

Erasures and Obliterations.

13. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.

14. In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.

Deeds, &c. referred to in a Will.

15. If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document must be required, with a view to ascertain whether it be entitled to probate; and, if not produced, its non-production must be accounted for.

16. No deed, paper, memorandum, or other document can form part of a will unless it was in existence at the time when the will was executed.

Appearance of the Paper.

17. If there are any vestiges of sealing wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum or other document must be required; and, if not produced, its non-production must be accounted for.

Married Woman's Will.

18. In granting probate of a married woman's will made by virtue of a power or administration with such will annexed, the power under which the will purports to have been made must be specified in the grant.

Codicils.

19. The above rules and orders respecting wills apply equally to codicils.

Doubtful Cases.

20. If it be doubtful whether any will or codicil be entitled to probate, or whether any interlineation, alteration, erasure,

or obliteration ought to prevail, or whether any deed, paper, memorandum, or other document ought to form part of a will or codicil, or if any doubt arise in consequence of the appearance of the paper, or on any other point, the District Registrar must communicate with the Registrars of the Principal Registry.

Non-contentious
Business.

Letters of Administration with Will annexed.

21. The right of parties to letters of administration with the will annexed, and letters of administration with the will annexed de bonis non, depends so entirely upon the circumstances of each particular case taken in connexion with the wording of the will, that no general rules, other than those which have obtained a judicial sanction, can be laid down for the guidance of the District Registrars. Whenever the right of the party applying is at all questionable, a statement of the case, accompanied by a copy of the will, must be transmitted to the Registrars of the Principal Registry, who will advise thereon.

AS TO PROBATE OF WILLS, CODICILS, AND TESTAMENTARY PAPERS RELATING TO PERSONALTY, AND DATED BEFORE THE 1ST JANUARY, 1838.

Execution of a Will.

22. It is not necessary that a will, codicil, or testamentary paper dated before 1st January, 1838, should be signed by the testator or attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his will, codicil, or testamentary disposition must be clearly proved by circumstances.

23. A will, codicil, or testamentary paper, signed at the end of it by the testator and attested by two disinterested witnesses (although there be no clause of attestation) is *prima facie* entitled to probate.

24. In cases where a will, codicil, or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to it in the presence of one attesting witness, or produced it with his name already written or his mark already made, to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil, or testamentary disposition, or otherwise notified his intention that it should operate as such.

Non-contentious
Business.

25. If the will, codicil, or testamentary paper is signed at the end of it by the testator but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

26. If the will, codicil, or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to show the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

27. The circumstance of a person being named as an executor in the will, codicil, or testamentary paper, or being interested as a legatee or as the husband or wife of a legatee under such will, codicil, or testamentary paper, rendered him or her incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the will, codicil, or testamentary paper, the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible, unless he or she shall first release his or her interest thereunder.

28. The will, codicil, or testamentary paper should appear on the face of it to be a complete document; if an attestation clause or the word "witnesses" appear written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a will, the copy of a will, or instructions for a will, it must *primâ facie* be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.

Appearance of Paper.

29. Any appearance of an attempted cancellation of a testamentary paper by burning, tearing, obliteration, or otherwise, and every circumstance leading to a presumption of abandonment or revocation of such a paper on the part of the testator, must be accounted for or explained by affidavits. In such cases the testamentary paper, and the evidence taken in support of it, should be transmitted to the Registrars of the Principal Registry.

Alterations and Interlineations.

30. Alterations and interlineations made by the testator, if unattested, are to be proved by the affidavits of two persons as to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by

affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st December, 1837, are subject to the provisions of 1 Vict. c. 26.

Non-contentious
Business.

Deeds, &c. referred to in a Will or annexed to a Will.

31. With respect to deeds, papers, memoranda, or other documents mentioned in a testamentary paper, or appearing to have been annexed or attached thereto, the foregoing rules, orders, and instructions as to wills bearing date since the 31st December, 1837, will apply.

Republication by Codicil.

32. A will made before the 1st of January, 1838, is republished by a subsequent codicil thereto duly executed.

AS TO LETTERS OF ADMINISTRATION.

33. The duties of the District Registrar in granting letters of administration are, in many respects, the same as in cases of probate. In both cases he must ascertain the time and place of the deceased's death, and the value of the property to be covered by the grant, and see that the applicant has been sworn as required by statute 55 Geo. 3, c. 184.

Notice to other Next of Kin.

34. Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the District Registrar may require proof by affidavit, or statutory declaration, that notice of such application has been given to such other next of kin.

Limited Administrations.

35. LIMITED ADMINISTRATIONS are not to be granted, unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge.

36. No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the Judge.

Administrations under Section 73.

37. Whenever the Court, under sect. 73, appoints an administrator other than the person who, prior to the "Court

Non-contentious
Business.

of Probate Act, 1857," would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

Grants to an Attorney.

38. In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney, acting under a power of attorney.

Grants of Administration to Guardians.

39. Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin, or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with.

40. In all cases of infants (i. e. under the age of seven years), a guardian must be assigned by order of the Judge, or of one of the Registrars of the Principal Registry; the Registrar's order is to be founded on an affidavit, showing that the proposed guardian is either de facto next of kin of the infants, or that their next of kin de facto has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.

41. Where there are both minors and infants, the guardian elected by the minors may act for the infants, without being specially assigned to them, by order of the Judge or a Registrar of the Principal Registry, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the Judge, or of a Registrar of the Principal Registry.

42. In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants.

Administrator's Oath.

43. The oath of administrators, and of administrators with the will, is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off, and is to set forth, when the fact is so, that the party applying is the only next of kin, or one of the next of kin, of the deceased. In all

administrations of a special character, the recitals in the oath, and in the letters of administration, must be framed in accordance with the facts of the case.

Non-contentious
Business.

Administration Bonds.

44. Administration bonds are to be attested by an officer of the Principal Registry, by a District Registrar, or his chief clerk, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the Principal or District Registry, must be attested by the same person who administers the oath to such administrator or administratrix.

45. In ordinary cases, two sureties are to be required, but when the property is *bonâ fide* under the value of fifty pounds, one surety only may be taken to the administration bond.

46. In all cases of limited or special administration, two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased, or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of, or dealt with by, the administrator by means of the grant. The alleged value of such property is to be verified by affidavit, if required.

47. The administration bond is, in all cases of limited or special administrations, to be prepared in the District Registry.

48. The District Registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons.

Justification of Sureties.

49. When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the Registry, and the sureties to the administration bond must justify.

GENERAL RULES AND ORDERS FOR THE DISTRICT REGISTRARS.

Last Wills.

50. The District Registrar is not, in any case in which a will apparently duly executed has been produced to him for

Non-contentious
Business.

probate or for administration with the will annexed, to grant probate of any former will, or administration with any former will annexed, or administration to the deceased, as having died intestate, without an order of the Judge or of one of the Registrars of the Principal Registry, showing that the last will is not entitled to probate. In the absence of such order the District Registrar is to communicate with the Registrars of the Principal Registry.

Time of issuing Grant.

51. No probate or letters of administration, with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge, or by order of one of the Registrars of the Principal Registry.

52. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the Judge, or by order of one of the Registrars of the Principal Registry.

53. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified by the practitioner to the District Registrar. Should the certificate be unsatisfactory, or the case be one of personal application, the District Registrar is to require an affidavit, or to communicate with the Registrars of the Principal Registry.

Filling up Grant.

54. Every grant of probate or of letters of administration issued from a District Registry is to be filled up therein, and any former grant which has been revoked or has ceased is to be cleared off therein.

Notices of Applications.

55. Notices of applications for grants of probate or administration, with the will annexed, transmitted by the District Registrar to the Registrars of the Principal Registry are to contain (in addition to the particulars specified in sect. 49 of the "Court of Probate Act, 1857") an extract of the words of the will or codicil by which the applicant has been appointed executor, or of the words (if any) upon which he founds his claim to such administration.

56. Notices of application are to set forth the names and interests of all persons who, according to the practice of the Court, would have a prior right to the applicant, and to show how such prior rights are cleared off. In case the persons or any of them have renounced, the date of his or her renuncia-

tion must be stated. If the applicant claims as the representative of another person, the date and particulars of the grant to him must appear.

Non-contentious
Business.

Oath of Executors and Administrators.

57. The usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the Registry.

58. The draft oaths to lead grants of special or limited probate or administration, with or without the will annexed, are to be transmitted by the District Registrar to the Registrars of the Principal Registry, in order to their being settled, and no special or limited grant is to issue until the draft oath to lead the same has been settled by a Registrar of the Principal Registry.

Identity of Parties.

59. The District Registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

Testamentary Papers to be marked.

60. Every will, copy of a will, or other testamentary paper, to which an executor or administrator with the will is sworn, must be marked by such executor or administrator and by the person before whom he is sworn.

Renunciations.

61. No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character.

Revocation and Alteration of Grants.

62. Grants of probate or letters of administration can only be revoked by order of the Judge or of one of the Registrars of the Principal Registry.

63. No grant of probate or letters of administration is to be altered by a District Registrar, without an order of a Registrar of the Principal Registry having been previously obtained. In case the name of the testator or intestate requires alteration, the notice of application must be renewed, and the alteration ordered is not to be made by the District Registrar until the usual certificate on such notice has been received from the Principal Registry.

Non-contentious
Business.

Affidavits.

64. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent making it is to be inserted therein.

65. In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

66. No affidavit will be admitted in any matter in the Court of Probate of which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure.

67. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the District Registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same, and that such person seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature, in the presence of the District Registrar, commissioner, or other authority before whom the affidavit was made.

68. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a partner or clerk of his proctor, solicitor, or attorney.

69. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

70. In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose as to the mode in which the said will or codicil was executed and attested.

71. The District Registrars are not to allow any affidavit to be filed (unless with the concurrence of the Registrars of the Principal Registry) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time the affidavit was made is not clearly shown by the initials of the commissioner or other person before whom it was sworn.

Caveats.

72. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the Principal Registry, or in the proper District Registry.

73. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and

then expire and be of no effect; but caveats may be renewed from time to time. Non-contentious
Business.

74. The District Registrar shall, immediately upon a caveat being entered, send a copy thereof to the Registrars of the Principal Registry, and also to the Registrar of any other district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death.

75. No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in the Principal Registry.

76. Caveats shall be warned from the Principal Registry only.

77. After a caveat has been entered, the District Registrar is not to proceed with the grant of probate or administration to which it relates until it has expired or been subducted, or until he has received notice from the Principal Registry that the caveat has been warned and no appearance given, or that the contentious proceedings consequent on the caveat have terminated.

78. The further rules in respect to caveats will be found in the "Rules, Orders and Instructions for the Registrars of the Principal Registry."

Citations and Subpœnas.

79. Citations and subpœnas can be issued from the Principal Registry only, and the rules applicable to them will be found in the "Rules, Orders and Instructions for the Registrars of the Principal Registry."

80. No grants are to issue from a District Registry after a citation without the production of an office copy of the decree or order of the judge, or of one of the Registrars of the Principal Registry authorizing the same.

Blind and Illiterate Testators.

81. The District Registrars are not to allow probate of the will, or administration with the will annexed, of any blind or obviously illiterate or ignorant person, to issue, unless they have previously satisfied themselves that the said will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents. When such information is not forthcoming, the District Registrars are to communicate with the Registrars of the Principal Registry.

Alterations in Grants, &c.

82. Whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or

Non-contentious
Business.

any alteration is made in a grant, or a renunciation is filed, notice of such re-swearing, alteration or renunciation is without delay to be forwarded by the District Registrar to the Registrars of the Principal Registry, but no fee shall be payable in respect of any such notice.

Lists of Grants.

83. The lists of grants of probate and administration required to be furnished by the District Registrars under section 51 of the Court of Probate Act, 1857, are to be furnished on the first and every other Thursday in the month, and are to contain the name of the Registry in which each grant was made; and the christian and surname of each testator and intestate.

84. Every such list of grants furnished by the District Registrar is to be accompanied by a copy of the record of each grant mentioned in it. The record, besides stating the necessary particulars of the grant to which it refers, is to contain the place and time of death of the testator or intestate; the names and description of each executor or administrator; the date of each grant; and the sum under which the value of the personal estate and effects is sworn; and in cases of administrations the names and description of the sureties.

85. Within four days from the end of each month each District Registrar is to forward to the Principal Registry a return, arranged alphabetically, of all grants of probate or letters of administration passed at his District Registry during the preceding month.

Grants for Property in the United Kingdom, &c.

86. Whenever a grant of probate or of letters of administration is made under statute 21 & 22 Vict. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavit made for the inland revenue office that the testator, or intestate, died domiciled in England, and that he was possessed of personal estate in Scotland other than that excluded by 22 & 23 Vict. c. 80, and the value of such personal estate must be separately stated in such affidavit. In case any portion of the personal estate be in Ireland, a separate affidavit and schedule must also be filed. Upon all such grants a note or memorandum must also be written and signed by the District Registrar to the effect, that the testator or intestate died domiciled in England.

87. Grants of probate and administration made in Ireland and confirmations granted in Scotland must be taken to the Principal Registry, and not to a District Registry, to be

sealed with the seal of the Court of Probate, in order to the same having force and effect in England.

Non-contentious
Business.

Notices to Queen's Proctor.

88. In all cases where application is made for letters of administration (with or without a will annexed) of the goods of a bastard dying a bachelor or a spinster, or a widower or widow without issue, notice of such application is to be given to her Majesty's Procurator-General (or in case the deceased died domiciled within the Duchy of Lancaster, to the solicitor for the Duchy in London), in order that he may determine whether he will interfere on the part of the crown; and no grant is to be issued until the officer of the crown has signified the course which he thinks proper to take.

89. In the case of persons dying intestate without any known relation, a citation must be issued from the Principal Registry against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased. See the rules, orders and instructions for the Registrars of the Principal Registry.

Transmission of Papers.

90. When motions are to be made before the Judge in Court, with regard to any application for probate or administration at a District Registry, the District Registrar is to transmit all original papers and documents to the Principal Registry, and the same, after the directions of the Court have been taken, will, on the application of the parties, be returned to the District Registrar together with an office copy of the decree of the Judge.

91. Original papers are also to be forwarded to the Principal Registry whenever an inspection of them is necessary, in order to enable the Registrars to answer the questions submitted to them by the District Registrar.

92. Original papers and documents may be transmitted by the District Registrars to the Registrars of the Principal Registry through the post office. Such letters or packets are to be superscribed with the words "On her Majesty's Service," and may be registered, if thought necessary.

Probate Copies of Wills.

93. The District Registrar is to take care that the copies of wills and affidavits to be annexed to the probate or letters of administration are fairly and properly written, and is to reject those which are otherwise.

Non-contentious
Business.

Office Copies.

94. Office copies of wills, and other documents furnished in a District Registry, will not be collated with the original will or other document, unless specially required. Every copy so required to be examined shall be certified under the hand of the District Registrar to be an examined copy.

95. The seal of the Court is not to be affixed to any office copy of a will, or other document, unless the same has been certified to be an examined copy.

Attendances with Documents.

96. If a will or other document filed in a District Registry is required to be produced at any place within three miles of that Registry, application must be made for that purpose not later than the day previously to that named for its production.

97. If a will or other document filed in a District Registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place.

Doubtful and Difficult Cases.

98. The District Registrars are in every case of doubt or difficulty to communicate with the Registrars of the Principal Registry.

TAXING BILLS OF COSTS.

99. All bills of costs are to be referred to the Registrars of the Principal Registry for taxation, and no special order shall be required for the purpose.

100. The rules in respect to taxing bills of costs will be found in the "Rules, Orders and Instructions for the Registrars of the Principal Registry."

FORMS OF INSTRUMENTS.

[*The Forms used in the DISTRICT REGISTRIES attached to the Probate Division are, as nearly as possible, the same as those in use in the Principal Registry, which see.*]

RULES AND ORDERS

FOR HER MAJESTY'S COURT OF PROBATE,

*Made under the Provisions of the Statutes 20 & 21 Vict. c. 77,
and 21 & 22 Vict. c. 95,*

IN RESPECT OF

CONTENTIOUS BUSINESS.

1. All rules and orders heretofore made and issued in respect of CONTENTIOUS business shall be repealed on and after the 1st day of September, 1862, except so far as concerns any matters or things done in accordance with them prior to the said day.

2. The following rules and orders in respect of contentious business shall take effect on and after the 1st day of September, 1862.

Contentious
Business.

CONTENTIOUS BUSINESS.

3. All proceedings in the Court of Probate or in the Registries thereof in respect of business not included in the Court of Probate Act, 1857, under the expression "Common Form Business," except the warning of caveats, shall be deemed to be contentious business.

Parties to Causes.

4. Executors or other parties who, previously to the passing of the Court of Probate Act, 1857, might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect as heretofore.

5. Next of kin and others who, previously to the passing of the said act, had a right to put executors or parties entitled to administration with will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore.

6. Parties who previously to the passing of the said act had a right to intervene in a cause may do so, with leave of the Judge or one of the Registrars, obtained by order on sum-

Contentious
Business.

mons, subject to the same limitations and the same rules with respect to costs as heretofore.

Caveats.

7. Caveats may be entered in the Principal Registry of the Court of Probate or in a District Registry thereof; if in the Principal Registry the person entering the caveat must insert the name of the deceased in the index to the caveat book.

8. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months, and then expire and be of no effect, but may be renewed from time to time.

9. Caveats shall be warned from the Principal Registry. The warning is to be served by leaving the same or a true copy thereof at the place mentioned in the caveat as the address of the person who entered it.

10. It shall be sufficient for the warning of a caveat that a Registrar send by the public post a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

11. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and must be accompanied by an address within three miles of the General Post Office at which any notice requiring service may be left. The form of warning will be supplied in the Registry.

12. Upon an appearance being entered in answer to the warning of a caveat, the matter shall be entered as a cause in the court book, and the contentious business shall thereupon be held to commence, and the expenses of the entry of such caveat and the warning thereof shall, upon taxation, be considered as costs in the cause.

Citations.

13. Citations can only be extracted from the Principal Registry, and no citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the Registry.

14. When a party proposes to prove a will or codicil in solemn form of law, and no caveat has been entered, or a caveat has been entered and no appearance given to the warning thereof, the contentious business shall be held to commence with the extracting of a citation in the Forms Nos. 1 and 2, or in some similar form.

15. Before a citation is signed by the registrar a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation

relates, and notice thereof shall be sent to the Registrar of any district in which the deceased appears to have had a residence at the time of his death. Such caveat is to be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending. This rule is not to apply to citations to exhibit an inventory, and to render an account, nor to citations to show cause why a bond should not be assigned in order to its being enforced against the sureties.

16. Citations to see proceedings may be extracted from the Registry, on the application of any party to the cause. A form is given, No. 4.

17. Every citation shall be written or printed on parchment, and the party extracting the same, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, a form of which is given, marked No. 5, to the Registry, and there deposit the præcipe, and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post Office.

18. Citations are to be served personally when that can be done, the party cited being resident in Great Britain or Ireland, but if personal service cannot be effected the direction of the Judge or Registrars as to the mode of service must be obtained. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing such party the original, if required by him so to do.

19. Citations may be served upon parties resident out of Great Britain and Ireland by the insertion of the same or of an abstract thereof, settled and signed by one of the Registrars, as an advertisement, in such of the morning and evening London newspapers, and if necessary in such local newspapers, and at such intervals as the Judge or a Registrar may direct: provided that in any case the Judge or a Registrar may direct a citation to be served personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation.

20. Before a party can proceed after the service of a citation an appearance must have been entered by or on behalf of the party cited, or an affidavit of personal service, and of non-appearance, must, together with the citation, have been filed in the Registry, or if personal service has not been duly effected, the order of the Judge, or of one of the Registrars in his absence, founded on an affidavit, and giving leave to proceed, must have been obtained. In case the citation has been advertised, the newspapers containing the advertisement, together with the citation and an affidavit of non-appearance, must be filed in the Registry.

21. The above rules, so far as they relate to the service of

Contentious
Business.

citations, are to apply to the service of all other instruments requiring personal service.

22. If contentious proceedings arise from the service of a citation, the expense of the citation and service thereof shall, upon taxation, be considered as costs in the cause.

Suits in Formâ Pauperis.

23. Any person desirous of prosecuting a suit in formâ pauperis is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

24. No person shall be admitted to prosecute a suit in formâ pauperis without the order of the Judge; and to obtain such order, the case laid before counsel, and his opinion thereon, with an affidavit of the party, or of his or her proctor, solicitor, or attorney that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth 25*l.* after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

25. Where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid.

Appearances.

26. All appearances are to be entered in the Principal Registry in a book provided for the purpose, and kept by the clerk of the papers. The entry must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased.

27. The entry of the appearance of a party shall be accompanied by an address within three miles of the General Post Office.

Service of Pleadings, &c.

28. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and orders, at the address furnished as aforesaid by the plaintiff and defendant respectively.

Default.

29. In case the party cited does not appear within the time limited in the citation, the cause shall proceed in default; nevertheless the party cited may enter an appearance at any time before a proceeding has been taken in default, or afterwards by leave of the Judge or of one of the Registrars.

Affidavits as to Scripts.

Contentious
Business.

30. In testamentary causes the plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant, are respectively to file their affidavits as to scripts, whether they have or have not any script in their possession. A Form, No. 10, is given.

31. Every script which has at any time been made by or under the direction of the testator, whether a will, codicil, draft of a will or codicil, or written instructions for the same, of which the deponent has any knowledge, is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith in the registry.

32. No party to the cause, nor his proctor, solicitor, or attorney, shall be at liberty, except by leave of the Judge, or of one of the Registrars of the Principal Registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.

The Declaration.

33. In ordinary cases it belongs to the plaintiff to deliver the declaration, and to the defendant to deliver the plea; but the party propounding the alleged last will and testament of the deceased shall, in all cases, even if defendant in the suit, deliver the declaration, and the party opposing the same deliver the plea.

34. The declaration is to be delivered to the opposite party, and a copy thereof filed in the Registry on one and the same day, and within one month from the entry of appearance by the defendant; but the party whose duty it is to bring in the declaration shall not be compelled to deliver it, or to file a copy thereof, until the expiration of eight days after the other party has filed his affidavit as to scripts.

35. In case of proving a will in solemn form of law, the party whose duty it is shall declare in the Form No. 6, or as near thereto as the circumstances of the case admit.

36. In case of proceedings in default, the plaintiff shall file his declaration in the Registry within eight days from the last day allowed in the citation for the appearance of the defendant.

Interest of Party opposing Will.

37. In a testamentary cause after delivery of the declaration the interest of the party to whom it has been delivered cannot be disputed by the party declaring, except by leave of the Judge.

The Plea.

38. A party desirous of pleading must deliver his plea to the other party within eight days after the service of the declaration, and file a copy thereof in the Registry on one and the same day, otherwise he will not be permitted to plead, except with the permission of the Judge, or of the Registrars of the Principal Registry in the absence of the Judge. A form of plea is given, No. 8.

Further Pleadings.

39. Either of the parties may, within eight days of the service upon him of the last previous pleading, give in a replication, rejoinder, sur-rejoinder, rebutter, or demurrer, as he may be advised. The form of the declaration and plea will, it is presumed, be a sufficient guide as to the form of any further pleadings.

General Rules as to Pleadings.

40. *If one party propound a will in his declaration, and the other party in his plea allege the existence of another will, each party may, with and subject to the permission of the Judge, adduce proof at the trial or hearing of the cause of the validity of the will upon which he relies.*—Repealed.

(a) In place of Rule 40 of the Rules and Orders in Contentious Business, and of the Form No. 8 referred to in Rule 38 of the said rules and orders, it is ordered, that—

40. If one party propounds a will or testamentary script in his declaration, and the adverse parties, or either of them, desire to propound another will or testamentary script, the adverse parties must, with their pleas, deliver to the opposite party and file in the Registry a declaration propounding such other will or testamentary script, to which the opposite party shall plead; and the form of declaration, and the pleadings and proceedings arising therefrom, shall be the same as are directed by the rules and orders of this Court in respect to the original declaration delivered and filed in the cause.

40a. The party or parties pleading to a declaration propounding a will or testamentary script shall be allowed to plead only the pleas hereunder set forth, unless by leave of the Judge, to be obtained on summons.

1. That the paper writing bearing date, &c., and alleged by the plaintiff [*or defendant*] to be the last will and testament [*or codicil to the last will and testament*] of A. B., late of, &c., deceased, was not duly executed

(a) Amended and Additional Rules and Orders for her Majesty's Court of Probate in Contentious Business. Dated 29th December, 1865.

according to the provisions of the statute 1 Vict. c. 26, in manner and form as alleged.

2. That A. B., the deceased in this cause, at the time his alleged will [*or* codicil] bears date, to wit, on the, &c., was not of sound mind, memory, and understanding.
3. That the execution of the said alleged will [*or* codicil] was obtained by the undue influence of C. D. and others acting with him.
4. That the execution of the said alleged will [*or* codicil] was obtained by the fraud of C. D. and others acting with him.
5. That the deceased at the time of the execution of the said alleged will [*or* codicil] did not know and approve of the contents thereof.

Any party pleading the last of the above pleas shall there-with (unless otherwise ordered by the Judge) deliver to the adverse parties and file in the Registry particulars in writing, stating shortly the substance of the case he intends to set up thereunder; and no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith.

41. In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court.

42. Either party desiring to alter or amend a pleading must apply to the Court upon motion; but if the alteration or amendment required be merely verbal or in the nature of a clerical error it may be made by order upon summons.

43. When a pleading has been ordered to be altered or amended, the time for filing the next pleading shall commence from the time of the order having been complied with.

44. If a party in any cause fail to deliver, or file a copy of the declaration, plea, or other pleading within the time specified in these rules, or within such extended time as may have been allowed, the party to whom such declaration, plea, or other pleading ought to have been delivered shall not be bound to receive it, and the copy of such declaration, plea, or other pleading shall not be filed, unless by direction of the Judge, or by order of the Registrars of the Principal Registry, obtained on summons. The expense of every application for such direction or order shall fall on the party who has caused the delay, unless the Judge or Registrars shall otherwise direct.

Contentious
Business.

45. When in any cause a conditional order is made, the party entitled to proceed in default must, before he can take the next step, obtain an order of the Registrars, or, if required, an order of the Judge upon summons, or on motion in Court.

The Issue.

46. Within fourteen days after the delivery of the last pleading in the cause, the party who brought in the declaration is to deliver to the other parties in the cause the issue in the Form No. 11, or in a form as near thereto as the circumstances of the case will admit, but the issue is not to be filed.

The Mode of Trial.

47. The party who delivers the issue shall therewith give notice to the other parties to the cause, that, after the expiration of eight days, he intends on a day to be specified in the notice to apply to the Court to try the questions at issue before itself, either with or without a jury, or to direct an issue to be tried before a Judge of assize, as the case may be; and if he do not give such notice with the issue, or within sixteen days from the day on which the issue was delivered, the other party may give a similar notice to him. A form of notice, No. 12, is subjoined.

48. A copy of every such notice shall be filed in the Registry with the case for motion as to mode of trial.

49. In each case the Judge shall, after hearing the parties upon motion in Court, direct in what mode the cause shall be tried or heard.

The Record.

50. After the direction of the Judge has been obtained as to the mode in which the cause is to be tried or heard, the party who delivered the declaration shall, within eight days, deposit the record of the cause in the Registry. The record is to conclude with a statement of the mode in which the Judge has directed the cause to be tried or heard, as in the Form No. 13.

51. In default of the appearance of defendants, being parties cited, a record, as in Form No. 14, or as near thereto as can be, shall be deposited in the Registry.

Trial by Jury.

52. If the cause be directed to be tried by a jury, the questions at issue between the parties are to be prepared by the party declaring from the record, and settled by one of the registrars of the principal registry. A form is given, No. 15, and a copy of such questions so settled is to be served on all the other parties to the cause.

53. After the questions have been so settled, any party in

the cause shall be at liberty to apply to the Judge on summons to alter or amend the same, and his decision shall be final and binding on the parties.

Contentious
Business.

Setting down the Cause for Trial or Hearing.

54. The party who has deposited the record shall set down the cause for trial or hearing, and upon the day on which he so sets it down shall give notice of his having done so to each party for whom an appearance has been entered; but if he delay setting down the cause for trial or hearing for the space of one month after the Court has directed the mode in which the questions at issue shall be tried or heard, either of the other parties may set the cause down for trial or hearing, and give a similar notice. A copy of every such notice shall be filed in the Registry; and the cause, unless the Judge shall otherwise direct, shall come on in its turn.

55. No cause is to be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the written consent of all parties to the suit, previously filed in the Registry.

Demurrer.

56. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the Judge without a jury.

The Hearing.

57. The hearing of the cause shall be conducted in Court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the Courts of Common Law.

58. After the conclusion of the trial or hearing, the Registrar shall enter on the record the finding of the jury, or the decision of the Judge, in a form corresponding as near as may be with those given, Nos. 25 and 26, and shall sign the same.

New Trial.

59. An application for a new trial of an issue tried before a jury may be made to the Court by motion within fourteen days from the day on which the issue was tried if the Court be then sitting, if not, on the first motion day after the expiration of the fourteen days.

60. An application for a re-hearing of a cause heard before the Judge without a jury, and in which evidence has been given *vivâ voce*, may be made by motion within fourteen days from the day on which the same was heard, if the Court be

Contentious
Business.

then sitting, if not, on the first motion day after the expiration of the fourteen days.

Interest Causes.

61. In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively.

62. In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant.

63. Forms of the declaration and plea in an interest cause are given, No. 7 and No. 9.

Proceedings by Petition.

64. Any question arising in a cause, and not being one of interest, domicile, or other matter usually brought before the Court by declaration and plea, may be brought before the Court by petition.

65. The party desiring to proceed by petition is to give notice thereof in writing to all the other parties in the cause, and such notice is to set forth the question intended to be raised for the decision of the Court, and a copy of such notice is to be filed in the registry.

66. In proceedings by petition the plaintiff shall, within eight days after he has given notice, deliver his petition to the defendant, and file a copy thereof in the registry upon one and the same day.

67. The defendant shall, within eight days after the delivery of the petition, deliver his answer to the plaintiff, and file a copy thereof in the registry upon one and the same day; and the same course shall be pursued with respect to the reply, rejoinder, &c., until the petition is concluded.

68. When the defendant raises the question to be heard by petition, and gives notice thereof to the plaintiff, the plaintiff shall, within eight days from the receipt of such notice, file a petition; otherwise the defendant shall be at liberty to do so.

69. Both plaintiff and defendant shall, within eight days from the day upon which the petition is concluded, file in the registry such affidavits and other proofs as may be necessary in support of their several averments therein. A form of petition is given, No. 28.

70. After the time for filing the affidavits and other proofs has expired, the petitioner is to set down the petition for hearing in the same manner as a cause.

Subpœnas.

Contentious
Business.

71. Every subpoena shall be written or printed on parchment, and may include the names of any number of witnesses. The party, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and deposit the præcipe. Forms are given, Nos. 16, 17, 18, and 19.

Admission of Documents.

72. Any party in a cause may call upon the other party or parties, by notice in writing in the form given, No. 20, to admit any document, saving any just exceptions: and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or hearing the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed as costs in the cause except in cases where the omission to give the notice was, in the opinion of the registrar, a saving of expense.

Production of Wills, &c.

73. Applications for an order for the production of papers or writings purporting to be testamentary, may be made to the judge, by motion or by summons when a suit is pending, and by motion upon affidavit when no suit is pending. If it can be shown that a testamentary paper is in the possession, within the power, or under the control of any person, a subpoena for the production of the same may be obtained by a registrar's order, founded on an affidavit. Forms of subpoenas applicable to these cases are given, Nos. 21 and 22, and Forms of Præcipe, Nos. 23 and 24.

Guardians to Minors.

74. A minor may elect a guardian for the purpose of carrying on, defending, or intervening in a suit, in the same manner and subject to the same rules as in respect of non-contentious business, and without having such guardian assigned to him; but guardians are to be assigned to infants (under the age of seven years) for the above purposes by the judge, or by an order of one of the registrars, founded on an affidavit to the effect required for such assignment in non-contentious business.

Pencil Writing on Will, &c.

75. When any pencil writing appears on a will, script, or other document filed in the registry, a fac-simile copy of the

Contentious
Business.

will, script, or other document, or of the pages or sheets thereof, containing the pencil writing, must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by an examiner in the registry.

Inventories.

76. In contentious business, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be filed, unless by order of the judge or of a registrar. The Form of Inventory is given, No. 27.

Notices.

77. All notices required by these rules, or by the practice of the Court, are to be in writing.

Real Estate.

78. Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorizing him to cite the heir or heirs at law, or other person or persons having or pretending interest in such real estate, to see proceedings: and the judge or registrar, on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, will make an order authorizing the person applying to cite the heir or heirs at law or other such person or persons as aforesaid: provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires.

Receiver of Real Estate.

79. A receiver of real estate pending suit is to give bond in the form given, No. 29, or in a form as near thereto as the circumstances of the case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the judge.

Affidavits.

80. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every person making an affidavit is to be inserted therein.

81. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

82. No affidavit will be admitted in any matter depending in the Court of Probate any material part of which is written on an erasure, or in the jurat of which there is any interlineation or erasure.

83. When an affidavit is made by any person who is blind,

or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also that such party made his or her mark thereto, or wrote his or her signature thereto, in the presence of the registrar, commissioner, or other person before whom the affidavit was made.

84. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before the partner or clerk of his proctor, solicitor, or attorney.

85. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

86. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used in Court, unless by leave of the judge.

Appeals.

87. Application for leave to appeal against any interlocutory decree or order of the Court of Probate must be made within a month of the delivery of the decree or order appealed from, or within such extended time as the judge shall direct, and notice of such application must be given to the party in whose favour such order or decree has been made, and filed in the registry. A Form of Notice is given, No. 29.

88. Parties may proceed to carry into effect the decision of the Court of Probate, notwithstanding any notice of appeal, or of application for leave to appeal, unless the judge shall otherwise order; and the judge may order the execution of his decree or order to be suspended, upon such terms as he sees fit.

Time fixed by these Rules.

89. The judge shall in every case in which a time is fixed by these rules for the performance of any act have power to extend the same to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit.

90. To prevent the time fixed for the performance of any act from expiring before application can be made to the judge for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the judge shall next sit in Chambers, or in Court to hear motions.

91. The time fixed in these rules for bringing in pleadings

Contentious
Business.

and for other proceedings shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Taxing Bills of Costs.

92. All bills of costs in contentious business are referred to the registrars of the principal registry for taxation, and may be taxed by them without any special order for that purpose. Such bills are (unless by leave of the judge or a registrar) to be filed in the registry two days at least before the day appointed for the taxation. An appointment for taxation will be made at the time of filing the bill.

93. The party who has obtained an appointment to tax his bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at the same time deliver to him or them a copy of the bill to be taxed.

94. When an appointment has been made by a registrar of the principal registry for taxing any bill of costs, and any of the parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill, after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

95. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

Accounts of Administrators and Receivers pending Suit.

96. Every administrator pendente lite and receiver of real estate shall exhibit an inventory and render an account of the property of the deceased which comes to his hands, and the accounts of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report, before the same are allowed by the Court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination.

Paying Money out of Court.

97. Persons applying for payment of money out of the registry must give forty-eight hours' notice of such application to the clerk of the papers. Such notice is to be in writing, and to set forth the day on which the money applied for was paid into the registry—the minute entered on receiving the same—the date and particulars of the order for payment to the applicant—and if the same be in payment of costs, the

date of filing the bill for taxation and of the registrar's certificate. During the summer vacation money can only be paid out on certain days, to be fixed by the registrars, notice whereof will be given in the registry.

Summonses.

98. A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding.

99. A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar.

100. The clerk of the papers is then to enter the name of the cause or matter and of the agent taking out the summons in the summons book, and return the summons (with the stamp cancelled), signed, to the applicant, who is to serve a copy on the party summoned. This copy must be served on the party summoned one clear day at least before the summons is returnable, and before 7 p.m. On Saturdays the copy of the summons is to be served before 2 p.m.

101. On the day and at the hour named in the summons the party issuing the same is to present himself with the original at the judge's chambers.

102. Both parties will be heard by the judge, who will make such order as he may think fit, and a note of such order will be made by the registrar in the summons book.

103. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.

104. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.

105. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy. The clerk of the papers before giving out the order is to see that the proper stamp has been affixed to it, and is to cancel such stamp.

106. If a summons is brought to the clerk of the papers,

Contentious
Business.

with a consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the judge: provided that the order sought is in the opinion of the registrars one which, under the circumstances, would be made by the judge.

Writs of Attachment and other Writs.

107. Applications for writs of attachment, and also for writs of fieri facias and of sequestration, must be made to the judge by motion in Court.

108. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved and signed by one of the registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the judge to sign such writs.

109. Any person in custody under a writ of attachment may apply for his or her discharge to the judge if the Court be then sitting; if not, then to one of the registrars, who for good cause shown shall have power to order such discharge.

Service of Notices, &c.

110. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by the rules and orders of the Court are required to be given or delivered to the opposite parties in a cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required, at the address furnished, by such parties respectively.

111. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the other parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the judge, or of the registrars in his absence.

112. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded, on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the judge shall otherwise direct.

113. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service

marked as an exhibit by the commissioner or other person before whom the affidavit is sworn.

Contentious
Business.

Change of Proctor, Solicitor, or Attorney.

114. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the judge, or to the registrars in his absence.

115. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction and by order of the judge or of the registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs.

Order for the immediate Examination of a Witness.

116. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the judge, or to one of the registrars in his absence, by summons, or if on behalf of a plaintiff proceeding in default of appearance of the parties cited or warned in the cause without summons before one of the registrars, who will direct the order to issue, or refer the application to the judge, as he may think fit.

117. Such witness shall be examined vivâ voce, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the judge or by the registrar to whom the application for the order is made.

118. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the judge or the registrar to whom the application is made for the order shall direct a shorter notice to be given.

Commissions and Requisitions for Examination of Witnesses.

119. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a plaintiff proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the judge, as he may think fit.

120. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by one of the registrars, or for want of agreement to be nominated by the registrar to whom the application is made.

121. The commission or requisition is to be drawn up and

Contentious
Business.

prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the judge. Form of a commission and requisition is given in the Appendix No. 31.

122. Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the judge.

123. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars.

Cases for Motion.

124. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded.

125. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars.

126. On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the judge.

127. Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit who are entitled to be heard in opposition thereto.

As to Costs.

128. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor,

solicitor, or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or rehearing shall have expired; or, in case a rule *nisi* should have been granted, until the rule is disposed of, unless the judge shall, for cause shown, direct a more speedy taxation.

Contentious
Business.

Review of Taxation.

129. Application for a review of taxation is to be made to the judge on summons.

Recovery of Costs.

130. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days, unless a summons be taken out for a review of the taxation, in which case the order for payment shall be suspended until the summons is disposed of.

131. This order shall be served on the proctor, solicitor, or attorney of the party liable [or if it is desired to enforce the order by committal on the party himself], and if the costs be not paid within the seven days a writ of fieri facias or writ of sequestration or a writ of elegit shall be issued as of course in the registry, upon an affidavit of service of the order, and nonpayment.

As to Subpœnas.

132. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness. Such subpœna shall be in the following form:

Subpœna ad testificandum.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [names of all witnesses included in the subpœna to be inserted], greeting. We command you and every of you to be and appear in your proper persons before the Right Honourable the President of the Probate, Divorce and Admiralty Division of our High Court of Justice at Westminster, in our county of Middlesex, on the day of 18 , by half-past ten of the clock in the forenoon of the same day, and so from day to day, whenever our said Court is sitting, until the cause or proceeding is heard, to testify the truth, according to your knowledge, in a certain cause now in our said Court before our said judge depending between A. B., plaintiff, and C. B., defendant, on the part of the plaintiff

Contentious
Business.

[*or, as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of 100*l.* Witness [*insert the name of the President*], at London, the day of 18 , in the year of our reign.

(Signed) X. Y., Registrar.

N.B.—Notice will be given to you of the day on which your attendance will be required.

Subpœna duces tecum.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*names of all parties included in the subpœna to be inserted*], greeting. We command you and every of you to be and appear in your proper persons before the Right Honourable the President of the Probate, Divorce and Admiralty Division of our High Court of Justice at Westminster, in our county of Middlesex, on the day of 18 , by half-past ten of the clock in the forenoon of the same day, and so from day to day whenever our said Court is sitting, until the cause or proceeding is heard, and also that you bring with you and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c. required to be produced*], then and there to testify and show all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in our said Court before our said Judge, depending between A. B., plaintiff, and C. B., defendant, on the part of the plaintiff [*as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of 100*l.* Witness [*insert the name of the President*], at London, the day of 18 , in the year of our reign.

(Signed) X. Y., Registrar.

N.B.—Notice will be given to you of the day on which your attendance will be required.

133. All summonses heretofore heard by the Registrars at the Principal Registry in the absence of the Judge shall hereafter be heard before one or more of the Registrars at the Principal Registry during the period appointed for the sittings of the Court at Westminster, as well as in the Judge's absence.

134. All rules and orders in respect to summonses now heard before the Judge in chambers at Westminster shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the Registrars at the Principal Registry.

135. The Registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the Judge.

Contentious
Business.

136. Any person heard on the summons objecting to the order so issued under the direction of the Registrars may, subject to any order as to costs, apply to the Judge on summons to rescind or vary the same.

APPENDIX.

Form which is to be followed as nearly as the circumstances of the case will allow.

No. 31.—*Commission or Requisition for Examination of Witnesses.*

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*here set forth the name and proper description of the commissioner*], greeting. Whereas a certain cause is now depending in the Probate, Divorce and Admiralty Division of our High Court of Justice between A. B., plaintiff, and C. D., defendant. And whereas by an order made in the said cause on the day of , 18 , on the application of the said A. B., it was ordered that a commission [*or requisition*] should issue under seal of our said Division for the examination of [*here insert name and address of one of the persons to be examined*] and others as witnesses to be produced on the part of the said A. B. (saving all just exceptions). Now know ye that we do by virtue of this commission [*or requisition*] to you directed, authorize [*or request*] you within thirty days after the receipt of this commission [*or requisition*] at a certain time and place to be by you appointed for that purpose with power of adjournment to such other time and place as to you shall seem convenient to cause the said witnesses to come before you, and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them by you touching the matters set forth in the pleadings in the said cause (a true and authentic copy whereof sealed with the seal of our said Division is hereunto annexed), and such oath being administered, we do hereby authorize [*or request*] and empower you to take the examination of the said witnesses touching the matters set forth in the said pleadings, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid and subscribed by you, we do require [*or request*] you forthwith to transmit the said examination, closely sealed up, to our Principal Probate Registry at Somerset House, Strand, in the county of Middlesex, together with these presents. And we do hereby give you full power and authority to do all such acts, matters and things as may be necessary, lawful and expedient for the due execution of this our commission [*or requisition*].

Dated at London, the day of , in the year of our Lord one thousand eight hundred and , and in the year of our reign.
(Signed) X. Y., Registrar.

Non-Contentious Business.

FEES

TO BE TAKEN IN THE

PRINCIPAL REGISTRY AND IN THE DISTRICT REGISTRIES
OF THE COURT OF PROBATE

IN

NON-CONTENTIOUS BUSINESS.

Probates or Letters of Administration with Will annexed, including double or cessate Probates or Letters of Administration with Will annexed, de bonis non or cessate, upon which stamp duty is payable in respect of the value of the Personal Estate of the Testator.

		DUTY.	FEES.					
			Probates.			Administrations.		
	£		£	£	s.	d.	£	s.	d.
ESTATE sworn—								
Under any sum	} 100	0	0	1	0	0	1	0
less than ..								
Not to exceed..	100	0	0	3	0	0	4	6
Under..	200	2	0	3	0	0	4	6
	*300	4	0	7	6	0	12	0
	400	6	0	12	0	0	16	6
	450	9	0	12	0	0	16	6
	500	9	0	16	6	1	2	6
	600	11	0	16	6	1	2	6
	800	15	1	2	6	1	13	0
	1,000	22	1	13	0	2	5	0
	1,500	30	2	5	0	3	7	6
	2,000	40	3	0	0	4	10	0
	3,000	62	3	15	0	4	13	9
	4,000	88	4	10	0	4	17	6
	5,000	113	4	15	0	5	5	0
	6,000	140	5	0	0	5	12	6
	7,000	165	5	5	0	6	0	0
	8,000	190	5	10	0	6	7	6
	9,000	215	5	15	0	6	15	0
	10,000	240	6	0	0	7	2	6
	12,000	275	6	5	0	7	10	0
	14,000	325	6	10	0	7	17	6
	16,000	375	6	17	6	8	8	9
	18,000	425	7	5	0	9	0	0
	20,000	475	7	12	6	9	11	3
	25,000	565	8	2	6	10	6	3
	30,000	690	8	15	0	11	5	0
	35,000	815	9	7	6	12	3	9
	40,000	940	10	6	3	13	11	3
	45,000	1,065	11	5	0	15	0	0
	50,000	1,190	12	3	9	16	7	6

* On grants of estates of persons dying on or after 1st June, 1881, not exceeding the value of 300*l.*, the fee is fifteen shillings. See p. 271.

		DUTY.	FEES.		Non-Contentious Business.			
			Probates.	Administrations.				
ESTATE SWORN—	£		£	£	s.	d.		
Under	60,000	1,375	13	2	6	17	16	3
	70,000	1,625	15	0	0	20	12	6
	80,000	1,875	16	17	6	23	8	9
	90,000	2,125	18	15	0	26	5	0
	100,000	2,375	20	12	6	29	1	3
	120,000	2,750	21	11	3	30	9	6
	140,000	3,250	23	8	9	33	5	9
	160,000	3,750	25	6	3	36	2	0
	180,000	4,250	27	3	9	38	18	3
	200,000	4,750	29	1	3	41	14	6
	250,000	5,625	30	18	9	44	10	9
	300,000	6,875	35	12	6	46	17	6
	350,000	8,125	40	6	3	49	4	6
	400,000	9,375	41	17	6	51	11	3
	500,000	11,250	43	8	9	53	18	3
	600,000	13,750	46	11	3	58	11	9
	700,000	16,250	49	13	9	63	5	3
	800,000	18,750	52	16	3	67	18	9
	900,000	21,250	55	18	9	72	12	3
	1,000,000	23,750	59	1	3	77	5	9
		For every additional £100,000, or any fractional part of £100,000, a further sum of £2,500.	For every additional £100,000, or any fractional part of £100,000, a further and additional fee of £3 : 2s. 6d.			For every additional £100,000, or any fractional part of £100,000, a further and additional fee of £4 : 13s. 6d.		

Double or Cessate Probate, &c.

For every double or cessate probate, or letters of administration with the will annexed, de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is under 450*l.*, or any smaller sum, the same fee as on a first grant under the same sum. £ s. d.

When the personal estate is of the value of 450*l.*, and upwards 0 12 6

For every duplicate and triplicate probate, or letters of administration with the will annexed, when the personal estate is under 450*l.* or any smaller sum, the same fee as on a first grant under the same sum.

When the personal estate is of the value of 450*l.* and upwards 0 12 6

Exemplifications.

For every exemplification of a probate, or letters of administration with the will annexed, in addition to the fees for engrossing and collating the will, and other documents registered with the same 1 1 0

Registering and Collating or Engrossing and Collating Wills.

For registering and collating or engrossing and collating wills and other documents, if three folios of ninety words each, or under, including parchment 0 4 6

If above three folios of ninety words each, per folio 0 1 6

Non-Contentious Business.	In cases of grants for Queen's pay or prize money, the effects being under 100 <i>l.</i> , without reference to the length of the will	£	s.	d.
	If there are pencil marks in a will or codicil, or if a will or codicil, or any part thereof, is to be or has been registered fac simile, in addition to any other fee for registering and collating, or for engrossing and collating the same:	0	4	6
	If the part or parts to be registered or engrossed fac simile are two folios of ninety words in length, or under.....	0	1	0
	If exceeding two folios, for every additional folio or part of a folio of ninety words	0	0	6

Codicils to Wills already proved.

For every probate of a codicil or codicils, or letters of administration with a codicil or codicils annexed, being a codicil or codicils to a will already proved, the same fees respectively as on a duplicate probate or duplicate letters of administration with will annexed.

Letters of Administration, including Letters of Administration de bonis non or cessate, upon which stamp duty is payable in respect of the Personal Estate of an Intestate.

Duplicate and Triplicate Letters of Administration, &c.

For every duplicate and triplicate letters of administration when the personal estate is under 300*l.*, or any sum less than 300*l.*, the same fee as on a first grant of letters of administration under the same sum.

For every duplicate and triplicate letters of administration when the personal estate is of the value of 300*l.* and upwards 0 12 6

Exemplifications.

For every exemplification of letters of administration 1 1 0

Administrations de bonis non or cessate.

For every grant of letters of administration de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is under 300*l.*, or any smaller sum, the same fee as on a first grant under the same sum.

When the personal estate is of the value of 300*l.* and upwards 0 12 6

Additional Security.

For noting on the grant of letters of administration with or without will annexed, and on the act, that additional security has been given 0 5 0

For every certificate for the inland revenue office, that additional security has been given ... 0 1 0

Articles to pay pro Ratâ.

For articles entered into by administrators to pay creditors *pro ratâ*, per folio of seventy-two words each 0 2 0

For the bond for the performance of the articles, or for payment of creditors *pro ratâ*, per folio of seventy-two words 0 2 0

Searches and Inspection of Wills, &c.

For every search for will or grant of letters of administration or any document filed in the Principal Registry, including the looking up and inspecting an original will before the same is registered, or a registered copy of a will or an administration act 0 1 0

	£	s.	d.	Non-Contentious Business.
For every third will or administration act looked up in addition to the above	0	1	0	
For looking up and inspecting an original will after the same is registered in addition to the fee for the search	0	1	0	
For looking up and producing any document filed in the Registry other than an original will or administration act ..	0	1	0	
For a search for a will or grant of letters of administration, and for reading the will when the party applying is unable or unwilling to search for or read the same:—				
For the search for each year or part of a year	0	0	6	
For reading the will:—				
If twenty folios of ninety words each or under	0	1	0	
For every additional twenty folios or part of twenty folios of ninety words each	0	1	0	

Searches for former Grants.

For every search by an officer of the Principal Registry in order to ascertain whether any probate or grant of letters of administration has already issued, or any application has been made for a grant of probate or administration, as under:—

For every full year or part of a year which has elapsed since the deceased's death..... 0 0 6

In case it be requisite to extend the search to one or more District Registries, a similar additional fee for the search in each of such District Registries.

Special and Limited Grants.

For every special or limited grant of probate or letters of administration with or without will annexed, in addition to the ordinary fees, as under:—

If the personal estate is under the value of 20*l.*, 1*s.* per folio of seventy-two words each on the bond, on the act, and on the grant of probate or letters of administration.

If the personal estate is of the value of 20*l.* and upwards, 2*s.* per folio of seventy-two words each on the bond, on the act, and on the grant of probate or letters of administration.

Whenever the personal estate to be placed in possession of, or dealt with by, the executor or administrator, by means of a special or limited grant of probate or letters of administration, exceeds in value the sum of 20*l.*, the fee of 2*s.* per folio of seventy-two words shall be payable on the bond, on the act, and on the grant, although the personal estate be sworn under 20*l.*

Sealing Irish and Scotch Grants.

For affixing the seal of the Court to any grant of probate or letters of administration, with or without will annexed, or to any exemplification of probate or letters of administration, with or without will annexed, under seal of the Court of Probate in Ireland, in order to its becoming in force for property in England,—such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England which is to be effected by the probate or other instrument to which the seal of the Court is to be affixed.

For the Registrar's fiat on an Irish grant	0	5	0
For affixing the seal of the Court to any confirmation of an executor issued by authority of a Commissary Court in Scotland	1	1	0

Non-Contentious Business.

Notation of Domicile.

	£	s.	d.
For noting on a probate or on letters of administration, with or without will annexed, that the testator or intestate died domiciled in England	0	5	0

Office Copies and Extracts.

For every office copy or extract of a will, or of a probate, or administration act, or of any document filed or deposited in the Principal Registry, if five folios of ninety words or under	0	2	6
If exceeding five folios of ninety words, for every additional folio or part of a folio	0	0	6
If the will or other document is 200 years old, and five folios of ninety words or under	0	5	0
If exceeding five folios of ninety words, for every additional folio or part of a folio	0	0	9
If the office copy of a will or any part of a will or other document is required to be made fac simile, and such will or part of a will or other document is two folios of ninety words in length or under, in addition to the fee for the copy	0	1	0
If exceeding two folios of ninety words, for every additional folio or part of a folio	0	0	6
For copies of wills and other documents in foreign languages made by persons specially employed for that purpose, the charges of the persons so employed will be taken in addition to any other fees which may be payable in respect of such copies.			
If a copy is required to be printed (in addition to a manuscript copy for the printer, at 6d. per folio of ninety words, and collating) :—			
For twenty folios of ninety words or under	0	10	0
For every additional folio or part of a folio	0	1	0
For office copy of a will, minute, order, decree, or any document under seal of the court for which no other fee is payable :—			
For the seal, in addition to the fee for the copy and collating	0	5	0
For copies of plans, drawings, and armorial bearings, &c., such fee as shall be determined by the registrar in each particular case.			

Collating Documents.

For collating copy of a probate and will, or copy of letters of administration with or without the will annexed, or any other instrument to be filed or deposited in the registry, or for collating any copy or instrument with an original document already filed or deposited in the registry, including the registrar's certificate in verification thereof :—			
If ten folios of ninety words each, or under	0	2	6
If above ten folios of ninety words each, per folio	0	0	3
If there is any pencil-writing copied, or the copy or any part thereof is fac simile, in addition to the above fees :—			
If such pencil-writing or fac simile copy is two folios of ninety words in length or under	0	0	6
For every additional folio or part of a folio	0	0	3

Attendances.

For attendance with any book or original document in any of the Courts of Law or Equity in London or Westminster, or elsewhere within three miles of the principal registry	1	1	0
For the second and each subsequent attendance in the same term or sittings after term	0	10	6

	£	s.	d.	Non-Contentious Business.
For attendance with books or original documents in any of the Courts of Law or Equity in London or Westminster, or elsewhere within three miles of the principal registry, when more than one book or document are required, for each book or document besides the first	0	5	0	
For the second and each subsequent attendance in the same term or sittings after term, for each book or document besides the first	0	2	6	
For each day's attendance with any book or original document in any of the Courts of Law or Equity, or elsewhere beyond the distance of three miles from the principal registry, exclusive of travelling expenses	1	1	0	
For each day's attendance with books or original documents in any of the Courts of Law or Equity, or elsewhere beyond the distance of three miles from the principal registry, exclusive of travelling expenses, when more than one book or document are required, for each book or document besides the first	0	5	0	
The travelling expenses to be advanced and paid to the messenger attending with books, or original documents, shall include all other necessary expenses which are to be or may have been incurred by such messenger.				

Registrar's Order.

For every registrar's order for revocation of a grant	0	5	0
For every other registrar's order	0	2	6

Filing.

For filing every affidavit or other document in the principal registry, except the oaths for executors, administrators, or administrators with the will, the first administration bond and the testamentary papers in respect of which probate or administration with will annexed is granted	0	2	6
For filing every exhibit	0	1	0
For filing in the principal registry any notice required to be sent there by a district registrar	0	0	6
For filing in a district registry any notice required to be sent there by a registrar of the principal registry	0	0	6

Caveats.

For the entry of every caveat	0	1	0
For each notice of such caveat to the district registrars	0	1	0
For every warning to a caveat	0	2	6
For every service of a warning to caveat sent by a registrar through the public post	0	2	6
For subducing a caveat	0	1	0
For notice to any district registrar to whom notice of a caveat has been sent of its having been subducted or warned	0	1	0

Receipts for Papers.

For every receipt for documents left in the principal registry in order to obtain a grant of probate or letters of administration with or without will annexed, or any second or subsequent grant	0	1	0
For every receipt for a document or documents delivered out of the principal registry	0	1	0

Non-Contentious Business.

Deposit of Wills.

For depositing every will of a person deceased in the principal registry for safe custody	£	s.	d.
For depositing every will of a living person for safe custody, including the deposit receipt	0	10	0

Taxing Costs.

For taxing every bill of costs, inclusive of the registrar's certificate :			
If five folios of seventy-two words, or under	0	5	0
If exceeding that length, for every additional folio	0	1	0
For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed :			
If the bill of costs is five folios of seventy-two words, or under	0	1	0
If exceeding five folios of seventy-two words, and under fifteen folios	0	2	6
If exceeding fifteen folios	0	5	0

Bonds.

For superintending and attesting the execution of a bond	0	1	6
If not completed on one occasion, for each subsequent attestation	0	1	0

Oaths.

For every oath administered by the Registrars, or by a commissioner authorized to administer oaths in the Principal Registry, to each deponent	0	1	0
For marking each exhibit	0	1	0

Settling Advertisements.

For settling the abstract of citation for advertisement or other advertisement.....	0	2	6
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Alterations in Grants.

For making alterations in grants of probate or letters of administration in pursuance of the order of one of the Registrars.	0	2	6
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Notations.

For noting alterations in and revocations of grants on the record of the same	0	2	6
For noting second and subsequent grants on the record of the first grant	0	2	6
For noting renunciations, or any other necessary matter on the record of a grant	0	2	6

Certificates.

For every certificate under the hand of one or more of the Registrars of the Principal Registry for which no other fee is payable	0	2	6
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Fiats.

For the fiat of a Registrar as to the form in which any will or codicil is to be registered	0	5	0
For noting on a testamentary paper that probate thereof is refused.....	0	5	0

Notices.

	£	s.	d.	Non-Contentious Business.
For every notice required to be sent to a District Registrar for which no other fee is payable, except notices required by Rule 72	0	1	0	

Perusing and Settling Oaths, &c.

For perusing and settling oaths to lead special or limited grants of probate or letters of administration, with or without will, or other instruments:				
If five folios of seventy-two words, or under	0	2	6	
If above five folios, for each additional folio	0	0	3	
For perusing deeds and other documents when necessary, per folio of seventy-two words	0	0	3	

Commissioner.

For each appointment of a commissioner to administer oaths in the Court of Probate, other than clerks and officers of the Court authorized to administer oaths in the Principal or in a District Registry only	1	0	0	
For registering the appointment of a commissioner appointed to administer oaths in the Court of Chancery	0	5	0	

Non-Contentious Business.

IN ADDITION TO THE ORDINARY FEES
TO BE TAKEN IN THE
PRINCIPAL REGISTRY OF THE COURT OF PROBATE
IN NON-CONTENTIOUS BUSINESS,

The following Fees are to be taken in
THE DEPARTMENT FOR PERSONAL APPLICATIONS.

On Probates or Letters of Administration with Will annexed, or Double or Cessate Probates or Letters of Administration with Will annexed de bonis non or cessate upon which Stamp Duty is payable in respect of the Personal Estate of the Testator.

Effects sworn under	Preparing Oath of Executors.	Preparing Affidavit for the Inland Revenue Office.	Probate under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 2 6	0 1 0	0 1 0
100	0 5 0	0 5 0	0 1 0	0 2 0
200	0 5 0	0 5 0	0 2 0	0 2 0
* 300	0 5 0	0 5 0	0 5 0	0 2 0
450	0 5 0	0 5 0	0 8 0	0 2 0
600	0 5 0	0 5 0	0 11 0	0 2 0
800	0 5 0	0 5 0	0 15 0	0 2 0
1,000	0 5 0	0 5 0	1 2 0	0 2 0
1,500	0 5 0	0 5 0	1 10 0	0 5 0
2,000	0 5 0	0 5 0	2 0 0	0 5 0
3,000	0 5 0	0 5 0	2 10 0	0 5 0
4,000	0 5 0	0 5 0	3 0 0	0 5 0
5,000	0 5 0	0 5 0	3 2 6	0 5 6
6,000	0 5 0	0 5 0	3 5 0	0 7 6
7,000	0 5 0	0 5 0	3 7 6	0 7 6
8,000	0 5 0	0 5 0	3 10 0	0 7 6
9,000	0 5 0	0 5 0	3 12 6	0 7 6
10,000	0 5 0	0 5 0	3 15 0	0 7 6
12,000	0 5 0	0 5 0	3 17 6	0 7 6
14,000	0 5 0	0 5 0	4 0 0	0 7 6
16,000	0 5 0	0 5 0	4 3 9	0 7 6
18,000	0 5 0	0 5 0	4 7 6	0 7 6
20,000	0 5 0	0 5 0	4 11 3	0 7 6
25,000	0 5 0	0 5 0	4 16 3	0 7 6
30,000	0 5 0	0 5 0	5 2 6	0 7 6
35,000	0 5 0	0 5 0	5 8 9	0 7 6
40,000	0 5 0	0 5 0	5 18 3	0 7 6
45,000	0 5 0	0 5 0	6 7 6	0 7 6
50,000	0 5 0	0 5 0	6 17 0	0 7 6
60,000	0 5 0	0 5 0	7 6 3	0 7 6
70,000	0 5 0	0 5 0	8 5 0	0 7 6
80,000	0 5 0	0 5 0	9 3 9	1 1 0

* On grants of estates of persons dying on or after 1st June, 1881, not exceeding the value of 300*l.*, the fee is Fifteen shillings. See p. 271.

Effects sworn under	Preparing Oath of Executors.	Preparing Affidavit for the Inland Revenue Office.	Probate under Seal.	Clerks.	Non-Contentious Business
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	
90,000	0 5 0	0 5 0	10 2 6	1 1 0	
100,000	0 5 0	0 5 0	11 1 3	1 1 0	
120,000	0 5 0	0 5 0	11 10 9	1 1 0	
140,000	0 5 0	0 5 0	12 9 6	1 1 0	
160,000	0 5 0	0 5 0	13 8 3	1 1 0	
180,000	0 5 0	0 5 0	14 7 0	1 1 0	
200,000	0 5 0	0 5 0	15 5 9	1 1 0	
250,000	0 5 0	0 5 0	16 4 6	1 1 0	
300,000	0 5 0	0 5 0	18 11 3	1 1 0	
350,000	0 5 0	0 5 0	20 18 3	1 1 0	
400,000	0 5 0	0 5 0	21 13 9	1 1 0	
500,000	0 5 0	0 5 0	22 9 6	1 1 0	

For every additional 100,000*l.*, or any fractional part of 100,000*l.*, under which the effects are sworn, in addition to the above fees, 1*l.* 11*s.* 3*d.*

In addition to the above, for all second and subsequent grants the same fees for looking up and taking an account of each former representation as on similar grants on which no stamp duty is payable.

For engrossing and collating the will, if three folios of £ s. d.
 ninety words or under, including parchment 0 4 6

If exceeding three folios, per folio 0 1 6

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed when there are pencil marks in the will or codicil, or when the will or codicil is to be registered fac simile in addition to any other fee for engrossing and collating the same:—

If the pencil marks in the will or codicil, or the part £ s. d.
 or parts thereof to be registered fac simile, are two folios of ninety words in length or under 0 1 0

If exceeding two folios, for every additional folio or part of the folio of ninety words 0 0 6

Fees on Letters of Administration with Will annexed.

In addition to the above fees;

For preparing the bond—if the effects are £ s. d.
 Under 20*l.* 0 1 6
 20*l.* and under 100*l.* 0 3 6
 100*l.* and upwards 0 5 0

On Letters of Administration granted to a Widow of an Intestate or to his children when the Personal Estate is sworn:

Not to exceed in value 20*l.* £0 2 6
 Not to exceed in value 30*l.* 0 3 6
 Not to exceed in value 40*l.* 0 4 6
 Not to exceed in value 50*l.* 0 5 6
 Not to exceed in value 60*l.* 0 6 6
 Not to exceed in value 70*l.* 0 7 6
 Not to exceed in value 80*l.* 0 8 6
 Not to exceed in value 90*l.* 0 9 6
 Not to exceed in value 100*l.* 0 10 6

The above include all fees payable in respect of such grants, for preparing oath of administrator and bond, preparing affidavit for the inland revenue, for letters of administration under seal, for clerks, also for administering oath or affirmation to the administrator, attesting execution of bond and instructions for and drawing and copying an instrument of renunciation to be executed by the widow if required.

Non-Contentious Business.

On other Grants of Letters of Administration including Letters of Administration de bonis non or Cessate, upon which Stamp Duty is payable in respect of the Personal Estate of the Intestate.

Effects sworn not to exceed	Preparing Oath of Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 4 0	0 2 6	0 1 0	—
20	0 4 0	0 2 6	0 1 0	0 1 0
50	0 7 6	0 3 0	0 1 0	0 2 0
100	0 8 6	0 5 0	0 1 0	0 2 0
Effects sworn under				
200	0 10 0	0 5 0	0 3 0	0 2 0
*300	0 10 0	0 5 0	0 8 0	0 2 0
450	0 10 0	0 5 0	0 11 0	0 2 0
600	0 10 0	0 5 0	0 15 0	0 2 0
800	0 10 0	0 5 0	1 2 0	0 2 0
1,000	0 10 0	0 5 0	1 10 0	0 5 0
1,500	0 10 0	0 5 0	2 5 0	0 5 0
2,000	0 10 0	0 5 0	3 0 0	0 5 0
3,000	0 10 0	0 5 0	3 1 9	0 7 6
4,000	0 10 0	0 5 0	3 3 9	0 7 6
5,000	0 10 0	0 5 0	3 7 6	0 7 6
6,000	0 10 0	0 5 0	3 11 3	0 7 6
7,000	0 10 0	0 5 0	3 15 0	0 7 6
8,000	0 10 0	0 5 0	3 18 9	0 7 6
9,000	0 10 0	0 5 0	4 2 6	0 7 6
10,000	0 10 0	0 5 0	4 6 3	0 7 6
12,000	0 10 0	0 5 0	4 10 0	0 7 6
14,000	0 10 0	0 5 0	4 13 9	0 7 6
16,000	0 10 0	0 5 0	4 19 6	0 7 6
18,000	0 10 0	0 5 0	5 5 0	0 7 6
20,000	0 10 0	0 5 0	5 10 9	0 7 6
25,000	0 10 0	0 5 0	5 18 3	0 7 6
30,000	0 10 0	0 5 0	6 7 6	0 7 6
35,000	0 10 0	0 5 0	6 17 0	0 7 6
40,000	0 10 0	0 5 0	7 10 9	0 7 6
45,000	0 10 0	0 5 0	8 5 0	0 7 6
50,000	0 10 0	0 5 0	8 18 9	0 7 6
60,000	0 10 0	0 5 0	9 13 3	0 7 6
70,000	0 10 0	0 5 0	11 1 3	0 7 6
80,000	0 10 0	0 5 0	12 9 6	1 1 0
90,000	0 10 0	0 5 0	13 17 6	1 1 0
100,000	0 10 0	0 5 0	15 5 9	1 1 0
120,000	0 10 0	0 5 0	15 19 9	1 1 0
140,000	0 10 0	0 5 0	17 8 0	1 1 0
160,000	0 10 0	0 5 0	18 16 3	1 1 0
180,000	0 10 0	0 5 0	20 4 0	1 1 0
200,000	0 10 0	0 5 0	21 12 6	1 1 0
250,000	0 10 0	0 5 0	23 0 3	1 1 0
300,000	0 10 0	0 5 0	24 3 9	1 1 0
350,000	0 10 0	0 5 0	25 7 3	1 1 0

* On grants of estates of persons dying on or after 1st June, 1881, not exceeding the value of 300£, the fee is Fifteen shillings. See p. 271.

Effects sworn under	Preparing Oath of Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.	Non-Contentious Business.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	
400,000	0 10 0	0 5 0	26 10 6	1 1 0	
500,000	0 10 0	0 5 0	27 14 0	1 1 0	
600,000	0 10 0	0 5 0	30 10 0	1 1 0	
700,000	0 10 0	0 5 0	32 7 9	1 1 0	
800,000	0 10 0	0 5 0	34 13 9	1 1 0	
900,000	0 10 0	0 5 0	37 1 6	1 1 0	
1,000,000	0 10 0	0 5 0	39 8 6	1 1 0	

For every additional 100,000*l.*, or any fractional part of 100,000*l.*, under which the effects are sworn, in addition to the above fees, 2*l.* 7*s.*

In addition to the above, for all second and subsequent grants, the same fees for looking up and taking an account of each former representation as on similar grants on which no stamp duty is payable.

On Double or Cessate Probates on which no Stamp Duty is payable.

If the Effects are sworn under	Looking up and taking an account of each former Grant.	Oath of the Executor.	Affidavit for Inland Revenue Office.	Double or Cessate Probate under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 2 6	0 2 6	0 1 0	0 1 0
100	0 5 0	0 5 0	0 5 0	0 1 0	0 2 0
200	0 5 0	0 6 6	0 5 0	0 3 0	0 2 0
*300	0 5 0	0 6 6	0 5 0	0 7 6	0 2 0
450	0 5 0	0 6 6	0 5 0	0 12 0	0 2 0
600	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
800	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,000	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,500	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
2,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
3,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
4,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
5,000	0 5 0	0 6 6	0 5 0	0 12 6	0 7 6
Above 5,000	The fees to be taken are the same as above, except the fee for clerks, which, if the effects are of the value of 70,000 <i>l.</i> or upwards, is 1 <i>l.</i> 1 <i>s.</i>				

* On grants of estates of persons dying on or after 1st June, 1881, not exceeding the value of 300*l.*, the fee is Fifteen shillings. See p. 271.

On Exemplification of Probate or Letters of Administration with or without Will annexed.

	£ s. d.
Looking up the grant of probate and original will, or grant of administration	0 5 0
Exemplification under seal, in addition to the 3 <i>l.</i> stamp	0 15 0
Clerks	0 2 6

Non-Contentious Business.

On Duplicate and Triplicate Probates, or Letters of Administration (with or without Will annexed), &c. £ s. d.

Looking up the will	0	5	0
Duplicate or triplicate probate or letters of administration, with or without the will annexed, or probate of codicil to will already proved, or letters of administration (with same annexed) if the personal estate is sworn under 450 <i>l.</i> , or any smaller sum, the same fees as on the original grant.			
If the personal estate is of the value of 450 <i>l.</i> and upwards	0	12	6
Clerks	0	2	6

On Letters of Administration with or without Will annexed de bonis non or Cessate on which no Stamp Duty is payable.

If the Effects are sworn under	Looking up and taking an Account of each former Grant.	Oath of the Administrator and Bond.	Affidavit for Inland Revenue Office.	De Bonis or Cessate Administration under Seal and Duty-paid Stamp.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 4 0	0 2 6	0 1 0	0 1 0
50	0 3 6	0 6 0	0 3 0	0 1 6	0 2 0
100	0 5 0	0 7 6	0 5 0	0 3 0	0 2 0
200	0 5 0	0 10 0	0 5 0	0 4 6	0 2 0
*300	0 5 0	0 10 0	0 5 0	0 12 0	0 2 0
450	0 5 0	0 10 0	0 5 0	0 12 6	0 2 0
600	0 5 0	0 10 0	0 5 0	0 12 6	0 2 0

If the effects are 600*l.* and upwards, the same fees as above, except the fee for clerks, which is 5*s.*

* On grants of estates of persons dying on or after 1st June, 1881, not exceeding the value of 300*l.*, the fee is Fifteen shillings. See p. 271.

Instructions, Drawing, Copying, &c.

Instructions for every oath, affidavit, instrument or document, other than the oaths and affidavits and instruments of renunciation included in the foregoing fees	0	5	0
Drawing same, at per folio of 72 words	0	1	0
Copies of any documents prepared in the department for personal applications, not included in the foregoing fees, at per folio of 72 words	0	0	6
Instructions for special or limited probates, or letters of administration (<i>with or without will annexed</i>)	0	5	0
Attendances on settling oaths for special or limited grants, ...	0	10	0
All other fees to be taken the same as for ordinary grants.			

Perusing, &c.

Perusing and settling oaths, affidavits, and other instruments and documents not drawn in the department for personal applications, if six folios of 72 words or under	0	1	6
If exceeding six folios, at per folio of 72 words	0	0	3
Perusing and abstracting deeds, or other instruments when necessary, at per folio of 72 words	0	0	3

Oaths, &c.

Non-Contentious Business.

Administering oaths, or taking affirmations, other than those included in the foregoing fees, each deponent	£	s.	d.
Marking each exhibit	0	1	0

Bonds.

Attesting execution of bond, other than the bond of a widow or children of an intestate included in former fees	0	1	6
If not completed on one occasion, for each subsequent attestation	0	1	0
On giving additional security, in addition to the above fees and the fees for preparing new bond:—			
For looking up original or any former bond	0	5	0

Amended Table of Fees to be taken in the Principal Registry, and in the District Registries, of the Court of Probate in NON-CONTENTIOUS BUSINESS.

On letters of administration granted to a widow of an intestate, or to one or more of his children, or to one or more of the children of an intestate widow, on personal application at the Principal Registry, other than letters of administration granted in pursuance of the provisions of the act of 36 & 37 Vict. c. 52, as extended by the act of 38 & 39 Vict. c. 27, in lieu of all fees heretofore authorized to be taken when the personal estate is sworn—

	£	s.	d.
Not to exceed in value 20 <i>l.</i>	0	5	0
Not to exceed in value 30 <i>l.</i>	0	6	0
Not to exceed in value 40 <i>l.</i>	0	7	0
Not to exceed in value 50 <i>l.</i>	0	8	0
Not to exceed in value 60 <i>l.</i>	0	9	0
Not to exceed in value 70 <i>l.</i>	0	10	0
Not to exceed in value 80 <i>l.</i>	0	11	0
Not to exceed in value 90 <i>l.</i>	0	12	0
Not to exceed in value 100 <i>l.</i>	0	13	0

The above include the fees payable for taking instructions for, and drawing, and copying an instrument of renunciation to be executed by the widow of an intestate if required, and all other fees payable in respect of such grants.

Non-contentious
Business.

COSTS

TO BE ALLOWED

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in the Principal Registry and in the District Registries of
the Court of Probate

IN

NON-CONTENTIOUS BUSINESS.

*In respect of Probates, including Double or Cessate Probates or Letters
of Administration with Will annexed, de bonis non or cessate,
upon which Stamp Duty is payable in respect of the Personal
Estate of the Testator.*

Effects sworn under	Oath of Executor and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn	Engrossing & collating the Will, 3 fos. of 90 words or under, including parchment.	Probate under Seal.	Extract- ing.	Clerks.
£	s. d.	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
5	2 6	2 6	4 6	0 1 0	1 0	—
20	2 6	2 6	4 6	0 1 0	3 4	0 1 0
100	5 0	5 0	4 6	0 1 0	6 8	0 2 0
200	6 8	6 8	4 6	0 3 0	6 8	0 2 0
300	10 0	10 0	4 6	0 7 6	6 8	0 2 0
450	10 0	10 0	4 6	0 12 0	6 8	0 2 0
600	10 0	10 0	4 6	0 16 6	6 8	0 2 0
800	10 0	10 0	4 6	1 2 6	6 8	0 2 0
1,000	10 0	10 0	4 6	1 13 0	6 8	0 2 0
1,500	10 0	10 0	4 6	2 5 0	6 8	0 5 0
2,000	10 0	10 0	4 6	3 0 0	6 8	0 5 0
3,000	10 0	10 0	4 6	3 15 0	13 4	0 5 0
4,000	10 0	10 0	4 6	4 10 0	13 4	0 5 0
5,000	10 0	10 0	4 6	4 15 0	13 4	0 7 6
6,000	10 0	10 0	4 6	5 0 0	13 4	0 7 6
7,000	10 0	10 0	4 6	5 5 0	13 4	0 7 6
8,000	10 0	10 0	4 6	5 10 0	13 4	0 7 6
9,000	10 0	10 0	4 6	5 15 0	13 4	0 7 6
10,000	10 0	10 0	4 6	6 0 0	13 4	0 7 6
12,000	10 0	10 0	4 6	6 5 0	13 4	0 7 6
14,000	10 0	10 0	4 6	6 10 0	13 4	0 7 6
16,000	10 0	10 0	4 6	6 17 6	13 4	0 7 6
18,000	10 0	10 0	4 6	7 5 0	13 4	0 7 6
20,000	10 0	10 0	4 6	7 12 6	13 4	0 7 6
25,000	10 0	10 0	4 6	8 2 6	13 4	0 7 6
30,000	10 0	10 0	4 6	8 15 0	13 4	0 7 6
35,000	10 0	10 0	4 6	9 7 6	13 4	0 7 6
40,000	10 0	10 0	4 6	10 6 3	13 4	0 7 6

Effects sworn under	Oath of Executor and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn	Engrossing & collating the Will, 3 fos. of 90 words or under, including parchment.	Probate under Seal.	Extracting.	Clerks.	Non-contentious Business.
£	s. d.	s. d.	s. d.	£ s. d.	s. d.	£ s. d.	
45,000	10 0	10 0	4 6	11 5 0	13 4	0 7 6	
50,000	10 0	10 0	4 6	12 3 9	13 4	0 7 6	
60,000	10 0	10 0	4 6	13 2 6	13 4	0 7 6	
70,000	10 0	10 0	4 6	15 0 0	13 4	0 7 6	
80,000	10 0	10 0	4 6	16 17 6	13 4	1 1 0	
90,000	10 0	10 0	4 6	18 15 0	13 4	1 1 0	
100,000	10 0	10 0	4 6	20 12 6	13 4	1 1 0	
120,000	10 0	10 0	4 6	21 11 3	13 4	1 1 0	
140,000	10 0	10 0	4 6	23 8 9	13 4	1 1 0	
160,000	10 0	10 0	4 6	25 6 3	13 4	1 1 0	
180,000	10 0	10 0	4 6	27 3 9	13 4	1 1 0	
200,000	10 0	10 0	4 6	29 1 3	13 4	1 1 0	
250,000	10 0	10 0	4 6	30 18 9	13 4	1 1 0	
300,000	10 0	10 0	4 6	35 12 6	13 4	1 1 0	
350,000	10 0	10 0	4 6	40 6 3	13 4	1 1 0	
400,000	10 0	10 0	4 6	41 17 6	13 4	1 1 0	
500,000	10 0	10 0	4 6	43 8 9	13 4	1 1 0	

And for every additional 100,000*l.*, or any fractional part of 100,000*l.*, under which the personal estate is sworn, in addition to the above fees, a further fee for probate under seal, of £ 3 2 6

In addition to the above, for all second or subsequent grants of probate or letters of administration with will annexed, the same fees for looking up the will and bespeaking engrossment as on similar grants upon which no stamp duty is payable.

For engrossing and collating the will, if more than three folios of ninety words each, per folio, including parchment £ s. d. 0 1 6

When there are two or more executors, and they are not sworn at the same time, for each attendance after the first on their being sworn to oath and affidavit— £ s. d.

If the effects are sworn under 20*l.* 0 2 6

If the effects are sworn under 100*l.* 0 5 0

If the effects are sworn above 100*l.* 0 6 8

In respect of Letters of Administration with Will annexed.

In addition to the above fees for preparing and attendance on the execution of the bond if the effects are— £ s. d.

Under 20*l.* 0 2 6

20*l.* and under 100*l.* 0 6 8

100*l.* and upwards 0 10 0

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed, when there are pencil marks in the will or codicil, or when the will or codicil is to be registered fac simile, in addition to any other fee for engrossing and collating the same:

If the pencil marks in the will or codicil, or the part or parts thereof to be registered fac simile are two folios of ninety words in length or under 0 1 0

If exceeding two folios, for every additional folio or part of a folio of ninety words 0 0 6

Non-Contentious Business.

In respect of Letters of Administration, including Letters of Administration de bonis non or Cessate upon which Stamp Duty is payable in respect of the Personal Estate of the Intestate.

Effects sworn under	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Letters of Administration under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
5	2 6	2 6	0 1 0	1 0	—
20	3 4	2 6	0 1 0	3 4	0 1 0
50	5 0	5 0	0 1 6	4 8	0 2 0
100	6 8	6 8	0 3 0	6 8	0 2 0
200	10 0	6 8	0 4 6	6 8	0 2 0
300	13 4	10 0	0 12 0	6 8	0 2 0
450	13 4	10 0	0 16 6	6 8	0 2 0
600	13 4	10 0	1 2 6	6 8	0 2 0
800	13 4	10 0	1 13 0	6 8	0 2 0
1,000	13 4	10 0	2 5 0	6 8	0 5 0
1,500	13 4	10 0	3 7 6	6 8	0 5 0
2,000	13 4	10 0	4 10 0	13 4	0 5 0
3,000	13 4	10 0	4 13 9	13 4	0 7 6
4,000	13 4	10 0	4 17 6	13 4	0 7 6
5,000	13 4	10 0	5 5 0	13 4	0 7 6
6,000	13 4	10 0	5 12 6	13 4	0 7 6
7,000	13 4	10 0	6 0 0	13 4	0 7 6
8,000	13 4	10 0	6 7 6	13 4	0 7 6
9,000	13 4	10 0	6 15 0	13 4	0 7 6
10,000	13 4	10 0	7 2 6	13 4	0 7 6
12,000	13 4	10 0	7 10 0	13 4	0 7 6
14,000	13 4	10 0	7 17 6	13 4	0 7 6
16,000	13 4	10 0	8 8 9	13 4	0 7 6
18,000	13 4	10 0	9 0 0	13 4	0 7 6
20,000	13 4	10 0	9 11 3	13 4	0 7 6
25,000	13 4	10 0	10 6 3	13 4	0 7 6
30,000	13 4	10 0	11 5 0	13 4	0 7 6
35,000	13 4	10 0	12 3 9	13 4	0 7 6
40,000	13 4	10 0	13 11 3	13 4	0 7 6
45,000	13 4	10 0	15 0 0	13 4	0 7 6
50,000	13 4	10 0	16 7 6	13 4	0 7 6
60,000	13 4	10 0	17 16 3	13 4	0 7 6
70,000	13 4	10 0	20 12 6	13 4	0 7 6
80,000	13 4	10 0	23 8 9	13 4	1 1 0
90,000	13 4	10 0	26 5 0	13 4	1 1 0
100,000	13 4	10 0	29 1 3	13 4	1 1 0
120,000	13 4	10 0	30 9 6	13 4	1 1 0
140,000	13 4	10 0	33 5 9	13 4	1 1 0
160,000	13 4	10 0	36 2 0	13 4	1 1 0
180,000	13 4	10 0	38 18 3	13 4	1 1 0
200,000	13 4	10 0	41 14 6	13 4	1 1 0
250,000	13 4	10 0	44 10 9	13 4	1 1 0
300,000	13 4	10 0	46 17 6	13 4	1 1 0
350,000	13 4	10 0	49 4 6	13 4	1 1 0
400,000	13 4	10 0	51 11 3	13 4	1 1 0
500,000	13 4	10 0	53 18 3	13 4	1 1 0

And for every additional 100,000 <i>l.</i> , or any fractional part of 100,000 <i>l.</i> , under which the personal estate is sworn, in addition to the above fees, a further fee for letters of administration under seal of	£	s.	d.	Non-Contentious Business.
.. .. .	4	13	6	

When there are two or more administrators, and they are not sworn at the same time, for each attendance after the first on their being sworn to oath and affidavit, and on execution of the bond—

If the effects are under 20 <i>l.</i>	0	3	4
If the effects are under 100 <i>l.</i>	0	5	0
If the effects are above 100 <i>l.</i>	0	10	0

In addition to the above fees, for preparing bond if the effects are—

Under 20 <i>l.</i>	0	1	8
20 <i>l.</i> and under 50 <i>l.</i>	0	3	4
50 <i>l.</i> and under 100 <i>l.</i>	0	5	0
100 <i>l.</i> and upwards	0	6	8

Non-Contentious Business.

In respect of Double or Cessate Probates, upon which no Stamp Duty is payable.

If the effects are sworn under	Attendance in the Registry, and looking up the Will and bespeaking the engrossment.	Oath of the Executor and attendance on his being sworn.	Affidavit for Inland Revenue Office, and attendance on the Executor being sworn.	Drawing and copying statement in support of application for the duty-paid Stamp.	Attending the Commissioners of Stamps and procuring the duty-paid Stamp.	Double or Cessate Probate under Seal.	Extracting.	Clerks.
	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
£ 5	3 4	2 6	2 6	—	—	1 0	1 0	—
20	3 4	2 6	2 6	—	—	1 0	3 4	1 0
100	6 8	5 0	5 0	6 8	13 4	1 0	6 8	2 0
200	6 8	6 8	6 8	6 8	13 4	3 0	6 8	2 0
300	6 8	10 0	10 0	6 8	13 4	7 6	6 8	2 0
450	6 8	10 0	10 0	6 8	13 4	12 0	6 8	2 0
600	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
800	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,500	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
2,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
3,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
4,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
5,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	7 6
Above 5,000								

The fees to be taken are the same as above, except the clerk's fee, which, if the effects are of the value of 70,000*l.* or upwards, is 1*l.* 1*s.*

The above fee for drawing and copying the statement in support of application for the duty-paid stamp is to be taken when the statement is five folios of seventy-two words or under. If the statement exceeds five folios, for each additional folio of seventy-two words..... 0 1 4

When there are two or more executors to be sworn, and they are not sworn at the same time, for each attendance after the first on their being sworn, the same fee as on a first grant under the same sum.

Exemplification of Probate or Letters of Administration with or without Will annexed.

Non-Contentious Business.

	£	s.	d.
Attending in the Registry, looking up the grant of probate and original will or grant of administration, and bespeaking exemplification	0	6	8
Exemplification under seal and stamp	1	1	0
Extracting	0	6	8
Clerks	0	2	6

In respect of Duplicate and Triplicate Probates or Letters of Administration with or without Will annexed.

	£	s.	d.
Attending in the Registry, looking up the will, and bespeaking duplicate or triplicate of a grant and engrossment	0	6	8
Drawing and copying statement in support of application to the Inland Revenue Office for the duty-paid stamp: The same fee as on a double or cessate probate.			
Attending at the Inland Revenue Office and procuring the duty-paid stamp	0	13	4
Duplicate or triplicate probate or letters of administration with or without will annexed. If the personal estate is under 450 <i>l.</i> , or any smaller sum, the same fee as on the original grant. If the personal estate is of the value of 450 <i>l.</i> and upwards..	0	12	6
Extracting	0	6	8
Clerks	0	2	6

[*In respect of Letters, &c.*

Non-Contentious Business.

In respect of Letters of Administration with or without Will annexed de bonis non or Cessate, upon which no Stamp Duty is payable.

If the Effects are sworn under	Attending in the Registry, looking up and perusing the Will, and taking an account of the former Grant.	Oath of the Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Drawing and copying State- ment in support of application to the Inland Revenue Office for the duty-paid Stamp.	Attending at the Inland Revenue Office and pro- curing the duty- paid Stamp.	De bonis or Cessate Administration with or without Will under Seal and duty-paid Stamp.	Extracting.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 6 8	0 5 0	0 2 6	—	—	0 1 0	0 1 0	—
20	0 6 8	0 5 0	0 2 6	—	—	0 1 0	0 3 4	0 1 0
50	0 6 8	0 6 8	0 5 0	—	—	0 1 6	0 4 8	0 2 0
100	0 6 8	0 10 0	0 6 8	0 5 0	0 6 8	0 3 0	0 6 8	0 2 0
200	0 6 8	0 13 4	0 6 8	0 6 8	0 13 4	0 4 6	0 6 8	0 2 0
300	0 6 8	0 16 8	0 10 0	0 6 8	0 13 4	0 12 0	0 6 8	0 2 0
450	0 6 8	0 16 8	0 10 0	0 6 8	0 13 4	0 12 6	0 6 8	0 2 0
Above 450								

The fees to be taken are the same as above, except the extracting fee, which, if the effects are 1,500*l.* and upwards, is 1*l.* 3*s.* 4*d.*, and the clerk's fee, which, if the effects are 600*l.* and upwards, is 5*s.*

£ s. d.
0 5 0
0 1 4

If there has been more than one previous grant, for each grant looked up after the first, a further fee of
The above fee for drawing and copying the statement in support of application to the Inland Revenue Office for the duty-
paid stamp is to be taken if the statement is five folios of seventy-two words or under. If it exceeds five folios, for each
additional folio
In addition to the above fees: For preparing the bond, and for each attendance after the first on the administrators being
sworn, and on execution of the bond, when there are two or more administrators and they are not sworn at the same
time, the same fees as on ordinary grants of letters of administration.

In respect of Probates, Special or Limited.

	£	s.	d.	Non-Contentious Business.
Consulting fee	0	6	8	
Affidavit for Inland Revenue Office and attendance on the executor being sworn thereto:—The same fee as on ordinary probates.				
Drawing special oath of executor, per folio of seventy-two words	0	1	0	
Fair copy of the oath for the Registrar, per folio of seventy-two words	0	0	4	
Attending the Registrar thereon	0	13	4	
Engrossing same, per folio of seventy-two words	0	0	4	
Each attendance on the executors being sworn	0	6	8	
Engrossing and collating the will				
Special or limited probate, under seal	The same fees as on ordinary probates.			
Extracting				
Clerks				

In respect of Letters of Administration with or without Will annexed, Special or Limited.

	£	s.	d.
Consulting fee	0	6	8
Perusing and abstracting deeds or other instruments, when necessary, at per folio of seventy-two words	0	0	4
Proxy of nomination	0	13	4
Affidavit for Inland Revenue Office and attendance on the administrators being sworn thereto:—The same fees as on ordinary grants of letters of administration.			
Drawing special oath of the administrators, per folio of seventy-two words	0	1	0
Fair copy of the oath for the Registrar to peruse, per folio of seventy-two words	0	0	4
Attending the Registrar thereon	0	13	4
Engrossing same, per folio of seventy-two words	0	0	4
Each attendance on the administrators being sworn, and on execution of the bond	0	6	8
Engrossing and collating the will	The same fees as on ordinary grants of letters of administration, with or without will annexed.		
Letters of administration, under seal and stamp			
Extracting			
Clerks			

Office Copies of, or Extracts from, Records, Wills, and other Documents.

	£	s.	d.
For attendance in the Registry and searching for a record, will, or other document, or for a grant of probate, or letters of administration, with or without will annexed, for five years, or any period less than five years, including the ordering of a copy	0	5	0
For every five years after the first five years	0	3	4
For the perusal of a record, will, or other document, when necessary, for the purpose of ordering extracts or for any other purpose, including the ordering of extracts, per folio of ninety words	0	0	4
For collating an office copy or extract of a record, will, or other document, with the original, or a registered copy thereof, including extracting fee, per folio of ninety words	0	0	2
For collating an office copy of the act on granting probate or administration with the original entry thereof, including extracting fee	0	1	0

Non-Contentious Business.

Caveats.

For attendance in the Registry and entering or subducting a caveat	£	s.	d.
	0	6	8
For attendance in the Registry and giving instructions for warning caveators to enter an appearance	0	6	8
For service of warning to a caveat, and copy	0	5	0

Affidavits other than the Affidavits and Oaths included in the Fees of Probate and Letters of Administration; and Declarations of Personal Estate and Effects.

For taking instructions for every affidavit or declaration of personal estate and effects	£	s.	d.
	0	6	8
For drawing and fair copy of the same, per folio of seventy-two words	0	1	4
For every attendance on the deponents or declarants being sworn or affirmed to such affidavits or declarations	0	6	8

Instruments of Renunciation and Consent, Letters of Attorney, and other Documents.

For taking instructions for every instrument of renunciation or consent, letters of attorney, or other document	£	s.	d.
	0	6	8
For drawing and fair copy thereof, per folio of seventy-two words	0	1	4

For Commissioners of the Court.

For each oath administered to each deponent by a commissioner, surrogate, or other person authorized to administer oaths in the Court of Probate.....	0	1	6
For marking each exhibit	0	1	0
For each occasion of superintending and attesting the execution of a bond.....	0	1	6

Taxing Bill of Costs.

For attendance on taxation of bill of costs	0	6	8
If long, such further fee as the Registrar may think proper.			

Proctors, Solicitors, and Attornies are not entitled to any costs in addition to those allowed by the foregoing table in respect of the non-contentious business comprised therein; but in case of their transacting any business not therein provided for, they will be allowed as follows:—

	£	s.	d.
For instructions for any original instrument prepared by them	0	6	8
For perusing every document which it is necessary to peruse as instructions, per folio of seventy-two words	0	0	4
For drawing and fair copy of any original instrument, per folio of seventy-two words	0	1	4
For every plain copy of a document, per folio of seventy-two words	0	0	4
If the same, or any part thereof, is to be copied fac-simile, for the part or parts to be so copied, per folio of seventy-two words, in addition to the above	0	0	2
For every necessary attendance on counsel, or on any practitioner or party other than their own client	0	6	8

FEES
TO BE TAKEN IN
COURT AND CONTENTIOUS BUSINESS
IN THE
COURT OF PROBATE.

<i>Citation.</i>		£	s.	d.
On every citation		0	5	0
For settling citation, or abstract thereof, for advertisement, or other advertisement:				
If five folios of seventy-two words or under		0	2	6
If above five folios, for each additional folio		0	0	3
<i>Appearance.</i>				
On entering appearance		0	2	6
On amending an appearance		0	2	6
Search for appearance		0	1	0
<i>Affidavit as to Scripts.</i>				
Filing affidavit as to scripts		0	2	6
Filing every script annexed to such affidavit		0	5	0
<i>Pleadings.</i>				
Filing declaration		0	5	0
Filing plea		0	5	0
Filing replication or any further pleading		0	5	0
Filing act on petition		0	5	0
Filing any writing to the act on petition by way of answer, reply, rejoinder, or conclusion		0	5	0
Filing joinder in demurrer		0	5	0
On amending or reforming pleadings		0	2	6
<i>Inventories.</i>				
Filing inventory		0	5	0
<i>Evidence.</i>				
Filing interrogatories (for each set)		0	5	0
Filing deposition of each witness		0	2	6
<i>Record.</i>				
On depositing the record.....		1	0	0
<i>Setting down.</i>				
Setting a cause down for hearing or trial.....		0	5	0
<i>Questions for Jury.</i>				
For settling questions of fact to be tried by a jury		0	10	0
Filing parchment copy questions as settled.....		0	2	6

Contentious Business.	<i>Subpœna.</i>	£	s.	d.
	On every subpœna against a witness	0	2	6
	On every subpœna to bring in a testamentary document	0	5	0
	<i>Hearing or Trial.</i>			
	On the hearing or trial of a cause, to be paid by the party setting down the cause for hearing or trial	1	10	0
	If the hearing or trial continues more than one day, for each day a further fee from the same party	1	0	0
	<i>Judge's Notes.</i>			
	Producing the judge's notes	0	5	0
	<i>Entering Verdict, Decree, or Order.</i>			
	Endorsing on the record the finding of the jury or the decision of the judge, to be paid by the successful party	0	5	0
	If exceeding five folios, for every additional folio of seventy-two words	0	1	0
	Entering in the Court book any final order or decree made with consent of parties by the judge or by one of the Registrars ..	0	10	0
	Entering the final decree in a cause, or order dismissing same, to be paid by the successful party	0	10	0
	Entering order for the examination of witnesses	0	5	0
	Entering any order or decree in the Court book, not otherwise specified	0	2	6
	If either of the above orders or decrees exceed five folios in length, for each additional folio	0	1	0
	<i>Orders.</i>			
	For any order issuing under the hand of the judge or one of the Registrars, except orders made on summons	0	5	0
	<i>Bill of Exceptions.</i>			
	Bill of exceptions signed by the judge	0	5	0
	<i>Receiver of Real Estate.</i>			
	Appointment of a receiver of real estate	1	0	0
	Bond to be executed by the receiver of real estate :			
	If three folios of seventy-two words or under	0	6	0
	If above three folios of seventy-two words, per folio	0	2	0
	<i>Bonds.</i>			
	Bonds given by any person or for any purpose, the same fees as if given by a receiver of real estate :			
	Assignment of bond	0	5	0
	<i>Taking Evidence.</i>			
	On every commission or requisition issuing under seal of the Court	1	0	0
	For taking the evidence of one or more witnesses before the Registrar, and within three miles of the General Post Office, for each day	3	3	0
	If beyond that distance, for each day in addition to travelling expenses	5	5	0
	If for part of a day only, such smaller fee as the Registrar in his discretion shall think proper.			
	Commissioner or Examiner appointed by order to take the examination of witnesses, for each day's attendance, besides travelling expenses	3	3	0

Reference to Registrar for his Report.

	£	s.	d.	Contentious Business.
On each reference to nominate a Commissioner to take evidence or an administrator or receiver, or to ascertain an amount of money to be paid or secured or the security to be given :				
For the Registrar's attendance	0	5	0	
For his report thereon	0	2	6	
On each reference for any other inquiry before the Registrars	1	0	0	
For every hour or part of an hour, after the first hour a further fee of	0	10	0	
For the Registrar's report, if 5 folios of 72 words or under ..	0	10	0	
If exceeding 5 folios, for every additional folio or part of a folio	0	2	0	

Motions.

Filing case for motion	0	5	0
For entering the order of Court on motion	0	5	0

Certificate.

For every certificate under the hand of one or more of the Registrars of the Principal Registry for which no other fee is payable	0	2	6
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Summons.

Summons to attend in Chambers or in the Principal Registry of the Court	0	2	6
For entering minute or order of Court on summons	0	2	6
If a final order in the cause	0	10	0

Notices.

Filing every notice	0	1	0
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Writs.

Writ of attachment	0	7	6
Writ of sequestration	1	0	0
Writ of fi. fa.	1	0	0
Writ of elegit	1	0	0

Filing Fees.

Filing certificate of County Court judge	0	1	0
Filing exhibits, each exhibit	0	1	0
Filing every affidavit or other document not otherwise specified ..	0	2	6
Filing and entry of remission of appeal	0	2	6

Attendance with Books, &c.

For every attendance with any book or original document in any of the Courts of Law or Equity in London or Westminster, or elsewhere within three miles of the Principal Registry	1	1	0
For second and each subsequent attendance in the same term or sittings after term	0	10	6
For every attendance with books or documents in any of the Courts of Law or Equity in London or Westminster, or elsewhere within three miles of the Principal Registry, when more than one book or document are required, for each book or document besides the first	0	5	0
For the second and each subsequent attendance in the same term or sittings after term, for each book or document besides the first	0	2	6

Contentious Business.		£	s.	d.
	For each day's attendance with any book or original document in any of the Courts of Law or Equity, or elsewhere beyond the distance of three miles from the Principal Registry, exclusive of travelling expenses	1	1	0
	For each day's attendance with books or documents in any of the Courts of Law or Equity, or elsewhere beyond the distance of three miles from the Principal Registry, exclusive of travelling expenses, when more than one book or document are required, for each book or document besides the first	0	5	0
	The travelling expenses to be advanced and paid to the messenger attending with wills, books, or original documents, shall include all other necessary expenses which are to be or may have been incurred by such messenger.			

Office Copies and Extracts.

For every office copy or extract of a minute, order, decree, or other document filed or deposited in the Principal Registry, if five folios of ninety words or under	0	2	6
If exceeding five folios of ninety words, per folio	0	0	6
For office copy of a minute, order, decree, or other document under seal of the Court for which no other fee is payable :			
For the seal, in addition to the fee for the copy and collating	0	5	0

Receipts.

For every receipt for a document or documents delivered out of the Principal Registry	0	1	0
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Searches in Court Books.

Search in each Court book, if within the last five years	0	1	0
If at an earlier period than within the last five years	0	2	6

Taxing Costs.

Taxing every bill of costs :				
When taxed as between party and party, for every folio or part of a folio of seventy-two words	0	0	6	
When taxed as between practitioner and client, for every folio or part of a folio of seventy-two words each	0	1	0	
For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed :				
If the bill of costs is five folios of seventy-two words or under	0	1	0	
If exceeding five folios of seventy-two words and under fifteen folios	0	2	6	
If exceeding fifteen folios	0	5	0	

Appointments of Officers.

For each appointment of a Commissioner in the Court of Probate other than clerks and officers of the Court authorized to administer oaths only in the Court, or in the Principal or a District Registry thereof	1	0	0
For registering the appointment of a Commissioner appointed to take oaths in the Court of Chancery	0	5	0

Oath.

For every oath administered by a Registrar or Commissioner authorized to administer oaths in the Court, or in the Principal Registry thereof, to each deponent	0	1	0
For making every exhibit	0	1	0

COSTS

TO BE ALLOWED

Contentious
Business.

PROCTORS, SOLICITORS, AND ATTORNIES

PRACTISING IN THE COURT OF PROBATE

IN COURT AND CONTENTIOUS BUSINESS.

<i>Citation.</i>	£	s.	d.
Citation, including præcipe	0	7	6
Citation to see proceedings, including præcipe	0	7	6
Certificate of service	0	2	6
Service of citation, if within two miles of the place of business of the practitioner or of the person employed to effect the service	0	5	0
If beyond that distance in addition for every mile one way	0	1	0
Affidavit of service, if three folios of seventy-two words or under	0	5	0
If necessarily more than three folios, for every folio, including copy	0	1	4
In cases in which the person to be served shall avoid service, or the service shall be effected beyond the jurisdiction, except in Scotland and Ireland, such a sum to be allowed for service as the Registrar may consider reasonable under the circumstances.			
<i>Subpœna.</i>			
Subpœna ad testificandum, including præcipe	0	5	0
Subpœna duces tecum, or to bring in a script, if five folios of seventy-two words, or under, including præcipe	0	5	0
If necessarily exceeding five folios, for each additional folio of 72 words	0	1	0
Service of a subpœna. Same as citation.			
<i>Writ.</i>			
Writ of attachment, including præcipe	0	7	6
Writ of sequestration, including præcipe	0	7	6
Writ of fieri facias, including præcipe	0	7	6
<i>Instructions.</i>			
Instructions for citation, for pleadings, for interrogatories, for special affidavits, or for inventories	0	6	8
Ditto to defend suit	0	6	8
Ditto for brief, or case for hearing	0	13	4
If there are several witnesses and the brief is necessarily long an additional fee will be allowed.			
<i>Pleadings and Copies.</i>			
Drawing and engrossing declaration, if ten folios of seventy-two words or under	1	0	0
If exceeding ten folios, for every additional folio	0	1	4
Drawing and engrossing pleas, replications, demurrers, and other pleadings, except those simply joining or taking issue, if ten folios of seventy-two words or under	1	0	0
If exceeding ten folios, for every additional folio	0	1	4
Copies of declaration or other pleadings to file, at per folio of seventy-two words	0	0	4

Contentious
Business.

The Issue.

Drawing the issue, if fifteen folios, of seventy-two words or under, including copy	£	s.	d.
.....	0	10	0
If exceeding fifteen folios, per folio, including copy	0	0	8

The Record.

Engrossing record to file, at per folio of seventy-two words, including parchment, ...	0	0	6
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Special Case.

For case for motion, including fair copy for the judge	0	10	0
If necessarily exceeding seven folios of seventy-two words in length, for every additional folio of seventy-two words, including copy	0	1	4
For case to advise on evidence, including copy for counsel	1	0	0
If the case exceeds ten folios in length, and it is shown that it could not be used as part of the brief or case for the hearing, an additional fee will be allowed.			

Drawing Instruments.

Drawing any instrument to be filed in or issued by the Registry for which no other fee is herein allowed, and for fair copy to be filed or issued, per folio of seventy-two words	0	1	4
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Perusing and abstracting.

For perusing and abstracting pleadings, testamentary papers, and exhibits of all kinds, per folio of seventy-two words	0	0	4
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Briefs and Cases for Hearing.

For drawing same, per folio of seventy-two words	0	1	0
For each copy, per folio of seventy-two words	0	0	4

Maps and Plans.

For maps or plans	each from	{	1	1	0
			to		
			3	3	0
			0	10	0
Copies of same if required	each from	{	to		
			1	0	0

Affidavits.

Drawing affidavit:			
If five folios of seventy-two words or under, including copy for the Court or Registry	0	6	8
If above five folios, per folio including copy	0	1	4

Interrogatories.

For drawing the same, at per folio of seventy-two words, and copy for the Court	0	1	4
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Copies.

For every plain copy of a script, exhibit, or other instrument per folio of seventy-two words	0	0	4
If the same or any part thereof are required to be made <i>fac simile</i> , for the part or parts copied <i>fac simile</i> , in addition to the above per folio of seventy-two words	0	0	2
All copies on parchment, per folio of seventy-two words, including the parchment	0	0	6

Collating.

	£	s.	d.	Contentious Business.
For collating any copy of a script, exhibit, or other instrument with the original, or with another copy thereof, per folio of seventy-two words, in addition to the fee for attendance....	0	0	2	

Notices.

All necessary notices, if three folios or under, inclusive of copy and service	0	5	0	
If necessarily exceeding three folios, for every additional folio	0	1	0	
In all cases where service of a notice is necessary beyond two miles of the place of business of the practitioner, the same fee as upon the service of a citation.				

Summonses.

Drawing summonses	0	3	4	
Copy of summons or order of the judge, and service	0	5	0	

Attendances.

For attendance on and seeing counsel, when the fee is one guinea	0	3	4	
When the fee exceeds one guinea and is under five guineas	0	6	8	
When the fee is five guineas and upwards	0	13	4	
Attendance on consultation	0	13	4	
Attendance on conference	0	6	8	
Attendance in pursuance of notice to admit	0	6	8	
For every hour after the first	0	6	8	
Attendance on trial or hearing when cause is in paper and not tried or heard, or on motion in court	0	13	4	
On trial or hearing	1	1	0	
If it lasts the whole day	2	2	0	
Attendance on examination of witnesses under a commission or order—				
If in England or Wales, per diem	2	2	0	
If elsewhere	3	3	0	
For all necessary attendances in chambers before the judge or before a commissioner, on counsel, in the Registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed	0	6	8	

Term Fees, Letters, and Messengers.

Term fee, letters, and messengers, for each term in which any business is done in court or in chambers other than obtaining an order for taxation, or attending the taxation of bills of costs	0	15	0	
For every necessary letter written to any person other than the practitioner's own client	0	3	6	

Bills of Costs.

Drawing bill of costs and copy for taxation, per folio of seventy-two words	0	1	0	
Copy for the adverse party, per folio of seventy-two words....	0	0	4	
Attendance on taxation of bill of costs	0	13	4	
If necessarily above an hour, for each additional hour or part of an hour	0	6	8	
If in any court or contentious business it should become necessary for proctors, solicitors, or attorneys to transact any business for which no fee is herein specified, such fee shall be allowed to them as would be allowed for similar business done in the courts of common law and equity.				

Contentious
Business.

COSTS
TO BE ALLOWED
PROCTORS, SOLICITORS, AND ATTORNIES
PRACTISING IN THE COURT OF PROBATE
IN CONTENTIOUS BUSINESS
FOR THE USE OF OTHER PERSONS.

Counsel's Clerks' Fees.

	£	s.	d.
Not to exceed as under :			
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards—at per cent. on the fee paid	2	10	0
On consultations :			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On general retainer	0	10	6
On common retainer	0	2	6
On conference	0	5	0

Witnesses' Expenses.

Allowance to witnesses, including their board and lodging, as between party and party :			
Common witnesses, such as labourers, journeymen, &c. &c. :			
If resident within five miles of the general post office, per diem	0	5	0
If beyond that distance, per diem	0	7	6
Master tradesmen, yeomen, farmers, &c. :			
If resident within five miles of the general post office, per diem	0	10	0
If resident beyond that distance, per diem	0	15	0
Auctioneers and accountants :			
If resident within five miles of the general post office, per diem	1	1	0
If resident beyond that distance, per diem	2	2	0
Professional men, including notaries, engineers, and surveyors, &c. :			
If resident within five miles of the general post office, per diem	1	1	0
If resident beyond that distance, per diem	3	3	0
Clerk to attornies or others :			
If resident within five miles of the general post office, per diem	0	10	6
If resident beyond that distance, per diem	1	1	0
Esquires, bankers, merchants, and gentlemen, per diem	1	1	0

		£	s.	d.	Contentious Business.
Females according to station in life :					
If resident within five miles of the general post office,	{	0	5	0	
per diem, from			to		
		0	10	0	
If resident beyond that distance, per diem, from	{	0	7	6	
			to		
		1	0	0	
Police inspector :					
If resident within five miles of the general post office, per diem		0	7	6	
If resident beyond that distance, per diem		0	10	0	
Police constable :					
If resident within five miles of the general post office, per diem		0	5	0	
If resident beyond that distance, per diem		0	7	6	
The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1s. per mile one way.					
<i>Commissioners of the Court.</i>					
Commissioners of the Court for administering each oath to each deponent		0	1	6	
For marking each exhibit		0	1	0	

IN THE HIGH COURT OF JUSTICE.
Probate Division.

1892. C. No. 1.

Between M. A. A. C. an infant (by G. C. her guardian) . Plaintiff,
and
R. C. and A. C. Defendants,
and
W. D. Party cited,
and
G. F. and M. (his wife) and W. H. F. . Interveners.

STATEMENT OF DEFENCE AND COUNTERCLAIM.

1. The defendants R. C. and A. C. deny that E. V. G. died intestate and they deny the several allegations in paragraphs 4, 5, 6 and 7 of the statement of claim.

And by way of counterclaim the said R. C. and A. C. say as follows:—

2. The will and codicil referred to in the statement of claim were signed by the said deceased E. V. G. in the presence of two witnesses present at the same time that is to say A. B. H. and A. C. who subscribed the same in the presence of the said deceased.

3. The deceased was at the time of the execution of the said will of sound mind memory and understanding.

4. The said M. A. A. C., W. D., M. F. and W. H. F. are next of kin of the said deceased.

The said defendants (plaintiffs in the counterclaim) claim as follows:—

1. That the Court will adjudge probate of the said will and codicil in solemn form of law.

2. That they may have such further or other relief as the nature of the case may require.

Delivered by of this day of 18 , solicitors for the defendant.

IN THE HIGH COURT OF JUSTICE.
Probate, Divorce, and Admiralty Division.
(Probate.)

1892. C. No. 1.

Between M. A. C. an infant (by G. C. her guardian) . Plaintiff,
and
R. C. and A. C. Defendants,
and
W. D. Party cited,
and
G. F. and M. (his wife) and W. H. F. . Interveners.

REPLY.

The plaintiff denies the allegations contained in the defendants' statement of defence and counterclaim and joins issue thereon.

Reply delivered the day of , 18 , by of , solicitors for the plaintiff.

EXAMPLE of ENDORSEMENT on WRIT OF SUMMONS in an ACTION
brought for the purpose of SETTING UP a LOST WILL.

The plaintiff claims to be one of the executors of the last will, dated in or about the summer of 18 (or on the day of 18) of H. E. P., late of M. P., in the county of S., deceased, who died on the day of 18 , she the said deceased having destroyed the said will at a time when she was not of sound mind and memory and understanding, and to have the contents of the said will established.

EXAMPLE of SET OF PLEADINGS in an ACTION for the purpose of
SETTING UP a LOST WILL.

IN THE HIGH COURT OF JUSTICE. 1892. C. No. 2.
Probate, Divorce, and Admiralty Division.
(Probate.)

Writ issued the day of 18 .
Between C. P. Plaintiff,
and
C. B. Defendant.

STATEMENT OF CLAIM.

1. The plaintiff is one of the executors appointed under the will of his late wife, H. E. P., late of M. P., in the county of S., deceased, who died on the 9th day of December, 1889, the said will having been duly executed by the said deceased in or about the summer of 1888.

2. The said will was subsequently destroyed by the said deceased in the month of October last, at the time when she was not of sound mind and memory and understanding.

3. The contents of the said will were in substance or to the effect as follows:—"This is the last will and testament of me H. E. P. of M. P., in the county of S., wife of C. P. of the same place, solicitor. I appoint my dear husband C. P. and my friend J. A. of B., surgeon, executors of this my will. I give and bequeath to my said husband C. P. a diamond ring (the testatrix also mentioned certain other articles of jewellery in the bequest to the plaintiff, the particulars of which he is unable to give) and to my sister C. B. all my other jewellery. I give and devise all the rest of my property, lands, tenements, and hereditaments whatsoever and wheresoever, and all the rest and residue of my personal estate to my said husband C. P. absolutely." The said will was signed by the deceased in the presence of C. D. H. of B. aforesaid, solicitor, and M. C. of N. M. aforesaid, domestic servant.

4. The plaintiff further says that after the destruction of the said will in the manner heretofore mentioned the said deceased desired and intended to make a fresh will, and therein to devise all her real estate to the plaintiff, and that the defendant, being the sister and heiress-at-law of the said deceased, and well knowing that the said deceased intended to make a fresh will, which as to such real estate would be in favour of the plaintiff, did by force, fraud, and duress prevent and hinder the said deceased from making and executing such fresh will as aforesaid.

The plaintiff claims—

1. That the Court shall decree probate of the contents of the said will as set forth in paragraph 3 of the statement of claim.

2. In the alternative—That the Court shall declare that the defendant is a trustee of the real estate of which the deceased died seised or entitled to for the plaintiff (a).

3. Such other and further relief as to the Court shall seem meet.

PARTICULARS OF FRAUD SO FAR AT PRESENT KNOWN TO THE PLAINTIFF.

That the defendant on the 27th of November last established herself at the house of the plaintiff at N. M. aforesaid, and continued there until the death of the deceased on the 9th day of December last, and there, in the absence of the plaintiff from the said 27th day of November last, and thenceforward to the date of the death of the deceased, with the assistance and co-operation of M. C., one of the witnesses to the original will destroyed by the deceased, and set out in paragraph 3 of the statement of claim, and the servant of the defendant, and the connivance of a nurse named E. P., well knowing that the said H. E. P. wished and intended to make a new will leaving her real estate to the plaintiff, prevented or hindered the said H. E. P. from doing so, and for the purpose of carrying out her said fraud prevented Mr. J. H. D., trustee of the will of the father of the said H. E. P., from gaining access to the deceased—the defendant well knowing that the deceased desired to see the said J. H. D. about and for the purpose of making a fresh will—until it was too late, and further wilfully abstained from sending for Mr. C. D. H., the family solicitor of the deceased, or some other practitioner or competent person for the like purpose, and also prevented the plaintiff from having access to the deceased, whereby he was unable to assist her to carry out her testamentary intentions in his favour.

Delivered the	day of	18	by	of	L. D. P.
for					agents

IN THE HIGH COURT OF JUSTICE.

Probate, Divorce and Admiralty Division.

(Probate.)

Between C. P. . . . Plaintiff,

and

C. B. . . . Defendant.

STATEMENT OF DEFENCE.

1. The said alleged will was not duly executed in accordance with the Wills Acts.

2. The said deceased duly revoked the said alleged will by burning, tearing, or otherwise destroying the same, with the intention of revoking the same, at a time when she was of sound mind, memory, and understanding.

3. The contents of the said will were not as alleged.

4. The said deceased did not desire or intend to make any fresh will, and the defendant did not by force or by fraud, or by duress, or at all, prevent or hinder the deceased from making any such will.

Dated and delivered the	day of	18	by	of	C. M.
agents for					

(a) See *Betts v. Doughty*, 5 P. D. 26; 48 L. J., P. D. & A. 71; 41 L. T. 560.

IN THE HIGH COURT OF JUSTICE.

1892. C. No. 2.

Probate, Divorce and Admiralty Division.
(Probate.)

Between C. P.	.	.	.	.	Plaintiff,
				and	
C. B.	.	.	.	.	Defendant.

REPLY.

The plaintiff takes and joins issue on the statement of defence.

Reply delivered the	day of	by	of	agent
for	.			

FORMS

UNDER THE JUDICATURE ACTS.

[APPENDIX A.]

PART I.—FORMS OF WRITS OF SUMMONS, &c.

No. 1.—*General Form of Writ of Summons* (O. 2, r. 3).

In the High Court of Justice. 18 . [*Here put the letter and number.*]
Division.

Between A. B., plaintiff,
and
C. D. and E. F., defendants.

VICTORIA, by the grace of God, &c.

To C. D. of in the county of .

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A. B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, ROUNDELL, EARL of SELBORNE, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One thousand eight hundred and

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

Indorsements to be made on the writ before issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by the said plaintiff, who resides at or, this writ was issued by E. F., of whose address for service is solicitor for the said plaintiff, who resides at or, this writ was issued by G. H., of whose address for service is agent for of solicitor for the said plaintiff, who resides at [*men-*]

tion the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any].

Indorsement to be made on the writ after service thereof.

This writ was served by me at on the defendant on
the day of 18 .

Indorsed the day of 18 .

(Signed)
(Address)

No. 5.—*Writ for Service out of the Jurisdiction, or where Notice in lieu of Service is to be given out of the Jurisdiction* (O. 2, r. 5).

18 . [*Here put the letter and number.*]

In the High Court of Justice.
Division.

Between A. B., plaintiff,
and
C. D. and E. F., defendants.

VICTORIA, by the grace of God, &c.

To C. D., of

We command you, C. D., That within [*here insert the number of days directed by the Court or Judge ordering the service or notice*] after the service of this writ [*or notice of this writ, as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of our High Court of Justice in an action at the suit of A. B.; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, &c.

Memoranda and Indorsement as in Form No. 1.

Indorsement to be made on the writ before the issue thereof.

N.B.—This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

No. 6.—*Specially Indorsed Writ for Service out of the Jurisdiction* (O. 2, r. 5).

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c., to of in the of .

We command you, That within* days after service† of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of

* Insert number of days directed by Court or Judge.

† If notice of the writ is to be served, insert here "of notice."

And take notice, that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, &c.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

Appearance is to be entered at the Central Office, Royal Courts of Justice, London.

Statement of Claim:—

The plaintiff's claim is

Particulars:—

Place of trial

(Signed)

And £ [or such sum as may be allowed on taxation] for costs. If the amount claimed is paid to the plaintiff or his solicitor or agent within* days from service † hereof, further proceedings will be stayed.

This writ was issued, &c.

This writ [or notice of this writ] was served, &c.

N.B.—This writ is to be used where the defendant, or all the defendants, or one or more defendant or defendants, is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself is to be served upon him.

No. 9.—Notice of Writ in lieu of Service to be given out of the Jurisdiction (O. 2, r. 5).

[Heading as in Form 1.]

To G. H., of

Take notice, that A. B., of has commenced an action against you, G. H., in the Division of her Majesty's High Court of Justice in England, by writ of that Court, dated the day of A.D. 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said A. B. may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the Central Office, Royal Courts of Justice, London.

(Signed) A. B. of &c.

or
X. Y. of &c.
Solicitor for A. B.

In the High Court of Justice.
Division.

* Insert number of days limited for appearance.

† If notice to be served, insert here "of notice."

No. 18.—*Form of Memorandum for Renewed Writ* (O. 8, r. 1).[*Heading as in Form 1.*]

Seal renewed writ of summons in this action indorsed as follows:—

[*Copy original writ and the indorsements.*]

PART II.—FORMS OF ENTRY OF APPEARANCE.

No. 1.—*Memorandum of Appearance in General* (O. 12, rr. 8, 13).

In the High Court of Justice.

Division.

18 . No. .

Between , plaintiff,
and
, defendant.

Enter an appearance for in this action.

Dated the day of 18 .

(Signed)
of * agent for of .No. 2.—*Notice of Entry of Appearance* (O. 12, r. 9).[*Heading as in Form 1.*]Take notice, that I have this day entered an appearance at the Central Office, Royal Courts of Justice [*or at the office of the registrar of the District Registry*] for the defendant to the writ of summons in this action.[*If statement of claim is required, add*] the said defendant requires delivery of a statement of claim.

Dated the day of 18 .

(Signed)
of agent for solicitor for the defendant .
To .No. 6.—*Entry of Appearance, Order XVII. Rule 5.*[*Heading as in Form 1.*]

Enter an appearance for who has been served with an order dated the day of to carry on and prosecute the proceedings in this action.

Dated the day of 18 .

(Signed)
of * agent for of .

* If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

No. 7.—*Entry of Appearance to Counter Claim* (O. 21, r. 13).[*Heading as in Form 1.*]

Enter an appearance for to the counter claim of the above-named
defendant in this action.

Dated the day of 18 .

 of* (Signed) agent for of .

* If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

No. 8.—*Affidavit for Entry of Appearance as Guardian* (O. 16, r. 18).[*Heading as in Form 1.*]

I of make oath and say as follows:—

A. B., of is a fit and proper person to act as guardian *ad litem* of the above-named infant defendant, and has no interest in the matters in question in this action [matter] adverse to that of the said infant, and the consent of the said A. B. to act as such guardian is hereto annexed.

Sworn, &c.

[*To this Affidavit shall be annexed the document signed by such guardian in testimony of his consent to act.*]

PART III.—GENERAL INDORSEMENTS ON WRITS OF SUMMONS (O. 3, r. 3).

SECTION V.—PROBATE (O. 3, r. 5).

1.

The plaintiff claims to be executor of the last will dated the day of of C. W., late of gentleman, deceased, who died on the day of and to have the said will established. This writ is issued against you as one of the next of kin of the said deceased [*or as the case may be*].

By an executor or legatee propounding a will in solemn form.

2.

The plaintiff claims to be executor of the last will dated the day of of C. D., late of deceased, who died on the day of and to have the probate of a pretended will of the said deceased, dated the day of revoked. This writ is issued against you as the executor of the said pretended will [*or as the case may be*].

By an executor or legatee of a former will, or a next of kin, &c., of the deceased seeking to obtain the revocation of a probate granted in common form.

3.

The plaintiff claims to be executor of the last will of C. D., late of deceased, who died on the day of dated the day of .
The plaintiff claims that the grant of letters of administration of the personal estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

By an executor or legatee of a will when letters of administration have been granted as in an intestacy.

4.

The plaintiff claims to be the brother and sole next of kin of C. D., of deceased, who died on the day of intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the sole next of kin of the deceased [*or as the case may be*].

By a person claiming a grant of administration as a next of kin of the deceased, but whose interest as next of kin is disputed.

[APPENDIX B.]

NOTICES, &c.

No. 2.—*Notice of Counter-claim* (O. 21, r. 12).

18 . [*Here put the letter and number.*]
 In the High Court of Justice.
 Division.

Between A. B., plaintiff,
 and
 C. D., defendant.

To Mr X. Y. Notice filed 18 .

“To the within-named X. Y.

“Take notice that if you do not appear to the within counter-claim of
 “the within-named C. D. within eight days from the service of this
 “defence and counter-claim upon you, you will be liable to have judg-
 “ment given against you in your absence.

“Appearance to be entered at .”

No. 5.—*Confession of Defence* (O. 24, r. 3).

[*Heading as in Form 2.*]

The plaintiff confesses the defence stated in the paragraph of the
 defendant's defence [*or, of the defendant's further defence*].

No. 6.—*Interrogatories* (O. 31, r. 4).

18 . [*Here put the letter and number.*]
 In the High Court of Justice.
 Division.

Between A. B., plaintiff,
 and
 C. D., E. F., and G. H., defendants.

Interrogatories on behalf of the above-named [*plaintiff, or defendant*
C. D.] for the examination of the above-named [*defendants E. F. and*
G. H., or plaintiff].

1. Did not, &c.

2. Has not, &c.

&c.

&c.

&c.

[*The defendant E. F. is required to answer the*
interrogatories numbered .]

[*The defendant G. H. is required to answer the*
interrogatories numbered .]

No. 7.—*Answer to Interrogatories* (O. 31, r. 9).

[Heading as in Form 6.]

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows :—

No. 8.—*Affidavit as to Documents* (O. 31, r. 13).

[Heading as in Form 2.]

I, the above-named defendant C. D., make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [here state upon what grounds the objection is made, and verify the facts as far as may be].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [state when].

6. That [here state what has become of the last-mentioned documents, and in whose possession they now are].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 9.—*Notice to produce Documents* (O. 31, r. 16).

[Heading as in Form 2].

Take notice that the [plaintiff or defendant] requires you to produce for his inspection the following documents referred to in your [statement of claim, or defence, or affidavit, dated the day of A.D.].

Describe documents required.

To Z.,
Solicitor for

X. Y.,
Solicitor to the .

No. 10.—*Notice to inspect Documents* (O. 31, r. 17).

[Heading as in Form 2.]

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [except the deed numbered in that notice] at [insert place of inspection] on Thursday next the instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff or defendant] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. on the ground that [state the ground] :—

No. 11.—*Notice to admit Documents* (O. 32, r. 3).

[Heading as in Form 2.]

Take notice that the plaintiff [or defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his solicitor or agent, at on between the hours of ; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively ; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

(Signed)

G. H., solicitor [or agent] for
plaintiff [or defendant].

To E. F., solicitor [or agent] for defendant [or plaintiff].

[Here describe the documents, the manner of doing which may be as follows :—]

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A. B. and C. D. first part, and E. F. second part.	January 1, 1848.
Indenture of lease from A. B. to C. D.	February 1, 1848.
Indenture of release between A. B. and C. D. first part, &c.	February 2, 1848.
Letter—defendant to plaintiff	March 1, 1848.
Policy of insurance on goods by ship "Isabella," on voyage from Oporto to London.	December 3, 1847.
Memorandum of agreement between C. D., captain of said ship, and E. F.	January 1, 1848.
Bill of exchange for 100 <i>l.</i> at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A. B. in the parish of X.	January 1, 1848.	
Letter—plaintiff to defendant.	February 1, 1848	Sent by General Post, February 2, 1848.
Notice to produce papers . .	March 1, 1848 . .	Served March 2, 1848, on defendant's attorney by E. F., of .
Record of a judgment of the Court of Queen's Bench in an action, <i>F. S. v. F. N.</i>	Trinity Term, 10th Vict.	
Letters patent of King Charles II. in the Rolls Chapel.	January 1, 1680.	

No. 12.—*Notice to admit Facts* (O. 32, r. 5).

[Heading as in Form 2.]

Take notice that the plaintiff [*or* defendant] in this cause requires the defendant [*or* plaintiff] to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant [*or* plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, &c.

G. D., solicitor [*or* agent] for the plaintiff [*or* defendant].To E. F., solicitor [*or* agent] for the defendant [*or* plaintiff].

The facts, the admission of which is required, are—

1. That John Smith died on the 1st of January, 1870.
2. That he died intestate.
3. That James Smith was his only lawful son.
4. That Julius Smith died on the 1st of April, 1876.
5. That Julius Smith never was married.

No. 13.—*Admission of Facts, pursuant to Notice* (O. 32, r. 5).

[Heading as in Form 2.]

The defendant [*or* plaintiff] in this cause, for the purposes of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this cause.

Provided that this admission is made for the purposes of this action

only, and is not an admission to be used against the defendant [*or plaintiff*] on any other occasion, or by anyone other than the plaintiff [*or defendant, or party requiring the admission*].

Delivered, &c.

E. F., solicitor [*or agent*] for the defendant [*or plaintiff*].
To G. H., solicitor [*or agent*] for the plaintiff [*or defendant*].

Facts admitted.	Qualifications or Limitations, if any, subject to which they are admitted.
1. That John Smith died on the 1st of January, 1870.	
2. That he died intestate.	2.
3. That James Smith was his law- ful son.	3. But not that he was his only lawful son.
4. That Julius Smith died.	4. But not that he died on the 1st of April, 1876.
5. That Julius Smith never was married.	5.

No. 14.—*Notice to Produce (General Form)* (O. 32 r. 8).

[*Heading as in Form 2.*]

Take notice, that you are hereby required to produce and show to the Court on the trial of this all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this and particularly

Dated the day of 18 .
To the above-named } (Signed) of agent for
h solicitor or agent . } solicitor for the above-named .

No. 15.—*Issue* (O. 34, r. 9).

[*Heading as in Form 2.*]

Whereas A. B. affirms, and C. D. denies [*here state the question or ques-
tions of fact to be tried*], and it has been ordered by the Hon. Mr. Justice
that the said question shall be tried [*here state mode of trial, whether
with or without a jury*], therefore let the same be tried accordingly.

No. 16.—*Notice of Trial* (O. 36, r. 13).

[*Heading as in Form 2.*]

Take notice of trial of this [*or of the issues in this* ordered to
be tried] [*or as the case may be*] in [*or as the case may be*], for the
day of next.

X. Y., plaintiff's solicitor [*or as the case may be*].

Dated .

To Z., defendant's solicitor [*or as the case may be*].

No. 17.—*Certificate of Officer after Trial with a Jury* (O. 36, r. 42).

[Heading as in Form 2.]

I certify that this was tried before the Hon. Mr. Justice
with a special jury of the county of , on the 12th and 13th days of
November, 1876.

The jury found [*state findings*].

The judge directed that judgment should be entered for the plaintiff
for £ , with costs of summons [*or as the case may be*].

A. B. [*title of officer*].

The day of 18 .

No. 18.—*Notice of Motion* (O. 52).

[Heading as in Form 2.]

Take notice, that the Court will be moved on day, the
day of 18 , at o'clock in the forenoon, or so soon thereafter
as counsel can be heard, by that .

Dated the day of 18 .

(Signed) of agent for solicitor for
the .

To .

No. 19.—*Notice of Discontinuance* (O. 26, r. 1).

[Heading as in Form 2.]

Take notice, that the plaintiff hereby* † .

Dated the day of 18 .

(Signed) of agent for solicitor for
the plaintiff.

To .

* "Wholly discontinues this action," or "withdraws so much of his
claim in this action as relates to," &c.

† If not against all the defendants, add "as against the defendant,"
&c.

No. 21.—*Notice of Renewal of Writ of Execution* (O. 42, r. 20).

[Heading as in Form 2.]

Take notice, that the writ of issued in this action directed to the
sheriff of , and bearing date the day of 18 , has been
renewed for one year from the day of 18 .

Dated the day of 18 .

(Signed) of agent for solicitor for
the .

To the sheriff of .

No. 23.—*Affidavit of Service of Summons* (O. 54, rr. 4, 5; O. 13, r. 2, and note).

[*Heading as in Form 2.*]

I of solicitor for the above-named make oath and say as follows:—

I did on the day of 18, before the hour of in the noon, serve the above-named in this action with a true copy of the summons [*hereto annexed*] *now produced and shown to me* marked A, by leaving it at the of the said situate with there.

Sworn at this day }
of 18 . }

Before me,

This affidavit is filed on behalf of the .

[*Note.*—In the official form the words in italics are substituted for those within brackets.]

[APPENDIX C.]

FORMS OF STATEMENTS OF CLAIM TO BE USED PURSUANT TO ORDER XIX., RULE 5.

SECTION I.

General.

In the High Court of Justice.
Division.

Writ issued the of 18 .

Between A. B. Plaintiff,

and
C. D. Defendant.

Statement of Claim.

The plaintiff, &c.

[*or*]

The plaintiff's claim is, &c.

[*To be filled up in manner exemplified in the following forms.*]

The plaintiff claims [*as in following forms*].

Place of trial .

(Signed)

Delivered the of 18 .

SECTION III.—ACTIONS WITHIN THE EXCLUSIVE COGNIZANCE OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION. SECTION 34 OF THE PRINCIPAL ACT.

No. 1.

Interest suit
(Probate).

The plaintiff is cousin-german and one of the next of kin of M. N., late of No. 1, High Street, Putney, in the county of Surrey, grocer, who died on or about the 1st of March, 1883, a widower without child, parent, brother, or sister, uncle or aunt, nephew or niece.

The plaintiff claims:

A grant to him of letters of administration of the personal estate and effects of the said deceased.

(Signed)

Delivered

No. 2.

The plaintiff is the executor appointed under the will of C. T., late of Bicester, in the county of Oxford, gentleman, who died on the 20th of January, 1883, the said will bearing date the 1st of January, 1875, and a codicil thereto, the 1st of October, 1875. Probate of will in solemn form.

The plaintiff claims:

That the Court shall decree probate of the said will and codicil in solemn form of law.

(Signed)
Delivered

[APPENDIX D.]

FORMS OF DEFENCE TO BE USED PURSUANT TO ORDER XIX., RULE 5.

SECTION I.—GENERAL FORM.

18 . No.

In the High Court of Justice.
Division.

Between plaintiff,
and
defendant.

Defence.

The defendant says that:—

1. }
2. } (*To be filled up in the manner exemplified in the following forms.*)
3. }

(Signed)
Delivered

Counterclaim.

The defendant says that:—

1. }
2. } (*To be filled up in the manner exemplified in the following forms.*)

The defendant counterclaims.

(Signed)
Delivered

*Defence and Counterclaim.**Defence.*

The defendant says:—

1. }
2. } (*To be filled up.*)

Counterclaim.

The defendant repeats paragraph 2 of his defence, and says that:—

3. }
4. } (*To be filled up.*)

The defendant counterclaims.

(Signed)
Delivered

SECTION III.—FORMS TO BE USED IN ACTIONS WITHIN THE EXCLUSIVE
COGNIZANCE OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION :
APPENDIX C., SECTION III.

No. 1.

Interest suit. The defendant is nephew and next of kin of the deceased, being son of G. B., the brother of the deceased, who died in his lifetime.
The defendant claims :—
That the Court pronounce that the defendant is the nephew and next of kin of the deceased, and entitled to a grant of letters of administration of the personal estate and effects of the deceased.

(Signed)
Delivered

No. 2.

Probate of will in solemn form. 1. The said will and codicil of the deceased were not duly executed according to the provisions of the statute 1 Vict. c. 26.
2. The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind, memory, and understanding.
3. The execution* of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him, whose names are at present unknown to the defendant].
4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [*state the nature of the fraud*].
5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, [*or*] of the contents of the residuary clause in the said will [*as the case may be*].
6. The deceased made his true last will, dated the 1st day of January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims :—

1. That the Court will pronounce against the said will and codicil propounded by the plaintiff :
2. That the Court will decree probate of the will of the deceased, dated the 1st of January, 1873, in solemn form of law.

(Signed)
Delivered

[APPENDIX E.]

General form. FORMS OF REPLY, &c. TO BE USED PURSUANT TO ORDER XIX., RULE 5.

SECTION I.

18 . [*Here put the letter and number.*]
In the High Court of Justice.
Division.

Between plaintiff,
and
defendant.

Reply.

The plaintiff as to the defence says that—

- 1.
- 2.

The plaintiff as to the counterclaim says that—

- 1.
- 2.

(Signed)
Delivered

[APPENDIX F.]

FORMS OF JUDGMENT.

No. 1.—*Default of Appearance and Defence in Case of Liquidated Demand* (O. 13, r. 3).

18 . [Here put the letter and number.]

In the High Court of Justice.
Division.Between A. B., plaintiff,
and
C. D. and E. F., defendants.

30th November, 18 .

The defendants [or the defendant C. D.] not having appeared to the writ of summons herein [or not having delivered any defence], it is this day adjudged that the plaintiff recover against the said defendant £ , and costs, to be taxed.

No. 1A.—*Judgment in Default against a Married Woman, alone or with Others.*

[Heading as in Form 1.]

The defendant , not having appeared to the writ of summons herein [or not having delivered any defence], it is this day adjudged that the plaintiff recover against the defendant , £ , and costs [if fixed costs insert amount, if taxed, insert to be taxed] such sum and costs so far as regards the defendant [name of married woman] to be payable out of her separate property as hereinafter mentioned and not otherwise.

And it is ordered that execution hereon against the said defendant [name of married woman] be limited to her separate property not subject to any restriction against anticipation (unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction).

No. 6.—*Judgment at Trial by Judge without a Jury* (O. 40, r. 5).

[Heading as in Form 1.]

[If in Chancery Division, name of Judge.]

This action coming on for trial [the day of and] this day before in the presence of counsel for the plaintiff and the defendants [or, if some of the defendants do not appear, for the plaintiff and the defendant C. D., no one appearing for the defendants E. F. and G. H., although they were duly served with notice of trial as by the affidavit of filed the day of appears,] upon hearing the probate of the will of , the answers of the defendants C. D., E. F., and G. H., to interrogatories, the admission in writing, dated and signed by [Mr. the solicitor for] the plaintiff A. B. and by [Mr. the solicitor for] the defendant C. D., the affidavit of filed the day of , the affidavit of filed the day of , the evidence of taken on their oral examination at the trial, and an exhibit marked X., being an indenture dated, &c. and made between [parties], and what was alleged by counsel on both sides: This Court doth declare, &c.

And this Court doth order and adjudge, &c.

No. 7.—*Judgment after Trial with a Jury.*

[Heading as in Form 1.]

15th November, 18 .

The action having on the 12th and 13th November, 18 , been tried before the Honourable Mr. Justice with a special jury of the county of , and the jury having found [*state findings as in officer's certificate*], and the said Mr. Justice having ordered that judgment be entered for the plaintiff for £ and costs [*or as the case may be*]: Therefore it is adjudged that the plaintiff recover against the defendant £ and £ for his costs [*or that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff £ for his costs of defence, or as the case may be*].

No. 10.—*Judgment upon Motion for Judgment (O. 40).*

[Heading as in Form 1.]

30th November, 18 .

This day, before Mr. X. of counsel for the plaintiff [*or as the case may be*], moved on behalf of the said [*state judgment moved for*], and the said Mr. X. having been heard of counsel for and Mr. Y. of counsel for the Court adjudged .

No 11.—*Judgment after Trial by Court without Jury (O. 36, r. 39).*

[Heading as in Form 1.]

Dated and entered the day of 18 .
This action having on the day of 18 , been tried before , and the said on the day of 18 , having ordered that judgment be entered for the for £ .
It is this day adjudged that the recover from the £ and costs to be taxed.

The above costs have been taxed and allowed at £ , as appears by a Taxing Officer's Certificate dated the day of 18 .
[Judgment entered the day of 18 .]

[*Note.*—These judgments are now *dated and entered* as of the day they are pronounced in Court. The words in italics are therefore substituted for the concluding words in brackets which are omitted.]

No. 11A (O. 36, r. 32).

[Heading as in Form 1.]

Dated and entered the day of 18 .
This action having on the day of 18 been called on for hearing before and the plaintiff having failed to appear, and the defendant having thereupon become entitled under O. 36, r. 32, to judgment dismissing the action, and the said having ordered that judgment be entered accordingly,

Therefore it is adjudged that this action do stand dismissed out of this Court with costs.

And it is further adjudged that the defendant recover against the plaintiff his costs, to be taxed.

The above costs have been taxed, &c.

[*Note*.—As to this form and its effect, see *Armour v. Bate*, (1891) 2 Q. B. 233. . . . As to necessity for entering up the costs before proceeding on such a judgment, see *Ex parte Crump*, 7 Times Rep. 556. . . .]

No. 12.—*Judgment in pursuance of Order* (O. 41, r. 7).

[*Heading as in Form 1.*]

Pursuant to the order of dated 18 , whereby it was ordered and default having been made

It is this day adjudged that the plaintiff recover against the said defendant £ and costs to be taxed.

The above costs have been taxed and allowed at £ as appears by a (taxing officer's) certificate dated the day of 18 .

No. 13.—*Judgment on Certificate of Registrar of County Court*
(O. 41, r. 7).

[*Heading as in Form 1.*]

The day of 18 .

This action having been ordered under section 26 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), to be tried in the county court of and the registrar of that court having certified that the result was

It is this day adjudged that recover against £ and costs to be taxed.

The above costs have been taxed and allowed at £ as appears by a (taxing officer's) certificate dated the day of 18 .

No. 14.—*Judgment for Defendant's Costs on Discontinuance*
(O. 26, r. 3).

[*Heading as in Form 1.*]

The day of 18 .

The plaintiff having by a notice in writing dated the day of 18 , wholly discontinued this action or withdrawn his claim in this action for or withdrawn so much of his claim in this action as relates to [*or as the case may be*].

It is this day adjudged that the defendant recover against the plaintiff costs to be taxed.

The above costs have been taxed and allowed at £ as appears by a (taxing officer's) certificate, dated the day of 18 .

No. 17.—*Judgment where no Judgment entered at Trial by Jury*
(O. 40, r. 2).

[*Heading as in Form 1.*]

Dated and entered the day of 18 .

This action having on the 18 been tried before and a jury of the of and the jury having found and the not having thought fit to order any judgment to be entered

Now on motion before the Court for judgment on behalf of the the Court having

It is this day adjudged that the recover against the the sum
of £ and costs to be taxed.

The above costs have been taxed and allowed at £ as appears by
a master's certificate dated the day of 18 .

[Judgment entered the day of 18 .]

(See note to No. 11, *supra*.)

No. 18.—*Judgment on Motion after Trial of Issue* (O. 40, r. 7).

[*Heading as in Form 1.*]

Dated and entered the day of 18 .

The issues *or* questions of fact arising in this action [*or cause or matter*]
by the order dated the day of ordered to be tried before
having on the day of been tried before and the
having found Now on motion before the Court for judgment on
behalf of the the Court having

It is this day adjudged that the recover against the the sum
of £ and costs to be taxed.

The above costs have been taxed and allowed at £ as appears by
a master's certificate dated the day of 18 .

[Judgment entered the day of 18 .]

(See note to No. 11, *supra*.)

[APPENDIX G.]

PART I.—FORMS OF PRÆCIPE (O. 42, r. 12).

No. 1.—*Of Fieri Facias* (O. 43).

18 . [*Here put the letter and number.*]

In the High Court of Justice.

Division.

Between A. B., plaintiff,

and

C. D. and others, defendants.

Seal a writ of *feri facias* directed to the sheriff of to levy against
C. D. the sum of £ and interest thereon at the rate of £
per centum per annum from the day of [and £ costs] to
judgment [*or order*] dated day of .

[Taxing officer's certificate dated day of .]

X. Y.,

Solicitor for [*party on whose behalf writ is to issue.*]

No. 2.—*Of Elegit* (O. 43).

[*Heading as in Form 1.*]

Seal a writ of *elegit* directed to the sheriff of against of
in the county of for not paying to A. B. the sum of £
together with interest thereon, from the day of [and the sum
of £ for costs] with interest thereon at the rate of £4 per centum per
annum.

Judgment [*or order*] dated day of 18 .

[Taxing officer's certificate dated day of 18 .]

X. Y.,

Solicitor for

No. 3.—*Of Venditioni Exponas* (O. 43).

[Heading as in Form 1.]

Seal a writ of *venditioni exponas* directed to the sheriff of to sell
the goods and of C. D. taken under a writ of *fieri facias* in this
action tested day of .

X. Y.,
Solicitor for

No. 4.—*Of Fieri Facias de Bonis Ecclesiasticis* (O. 43, r. 5).

[Heading as in Form 1.]

Seal a writ of *fieri facias de bonis ecclesiasticis* directed to the Bishop [or
Archbishop, as the case may be] of to levy against C. D. the sum of
£ .

Judgment [or order] dated day of .
[Taxing officer's certificate dated day of .]

X. Y.,
Solicitor for

No. 5.—*Of Sequestrari Facias de Bonis Ecclesiasticis* (O. 43, r. 5).

[Heading as in Form 1.]

Seal a writ of *sequestrari facias* directed to the Bishop of against
C. D. for not paying to A. B. the sum of £ .

No. 6.—*Of Writ of Sequestration* (O. 43).

[Heading as in Form 1.]

Seal a writ of sequestration against C. D. for not at the
suit of A. B. directed to [names of Commissioners].
Order dated day of .

No. 7.—*Of Writ of Possession* (O. 47).

[Heading as in Form 1.]

Seal a writ of possession directed to the sheriff of to deliver pos-
session to A. B. of .
Judgment dated day of .

No. 10.—*Of Writ of Attachment* (O. 44).

[Heading as in Form 1.]

Seal in pursuance of order dated day of an attachment
directed to the sheriff of against C. D. for not delivering to A. B.

No. 11.—*Of Distringas against Ex-Sheriff* (O. 43, r. 5).

[Heading as in Form 1.]

Seal a writ of *distringas nuper vicecomitem quod venditioni exponat*, directed to the sheriff of to sell the goods and of taken under a writ of *feri facias* in this action tested the day of

18 .
Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

No. 17.—*Of Commission to examine Witnesses* (O. 37, r. 6).

[Heading as in Form 1.]

Seal in pursuance of order dated a writ in the nature of a mandamus or commission to examine witnesses directed to

Dated, &c. [*as in Form 11, supra*].

No. 19.—*Of Amended Summons* (O. 28, r. 1).

[Heading as in Form 1.]

Amend in pursuance of order [*or fiat*] dated the writ of summons in this action by [*set out amendments when required*].

Dated, &c. [*as in Form 11, supra*].

No. 20.—*Of Renewed Summons* (O. 8).

[Heading as in Form 1.]

Seal in pursuance of order dated a renewed writ of summons in this action, indorsed as follows

Dated, &c. [*as in Form 11, supra*].

No. 21.—*Of Subpœna* (O. 37, r. 26).

[Heading as in Form 1.]

Seal writ of subpœna on behalf of the directed to returnable

Dated, &c. [*as in Form 11, supra*].

No. 22.—*Entry of Action for Trial* (O. 36, r. 20).

[Heading as in Form 1.]

Enter this action for trial.

Dated the day of 18 .

(Signed)

(Address)

No. 23.—*Entry of Appeal* (O. 58, r. 8).[*Heading as in Form 1.*]

Enter this appeal from the order [*or judgment*] of in this action,
 dated the day of 18 .
 Dated, &c. [*as in Form 22, supra*].

No. 24.—*Entry for Argument generally.*[*Heading as in Form 1.*]

Set down for argument the
 Dated, &c. [*as in Form 22, supra*].

No. 25.—*Entry of Special Case* (O. 34, r. 5).[*Heading as in Form 1.*]

Set down the dated the day of 18 of Mr. the
 referee in this for hearing as a special case.
 Dated, &c. [*as in Form 22, supra*].

No. 26.—*Memorandum of Service of Notice of Judgment*
(O. 16, r. 42).[*Heading as in Form 1.*]

Enter memorandum of service of notice of judgment made in this
 action, and dated the day of 18 , on the undermentioned
 persons, viz. :—

Name of Party served.	Date of Service.

Dated, &c. [*as in Form 22, supra*].

No. 27.—*Search* (O. 61, r. 23).[*Heading as in Form 1.*]

Search for

Dated the day of 18 .

(Signed)

(Address)

Agent for

Solicitor or

No. 28.—*Memorandum on Notice of Judgment* (O. 16, r. 43).

Take notice that from the time of the service of this notice you [*or as the case may be, the infant or person of unsound mind*] will be bound by the proceedings in the above cause, in the same manner as if you [*or the said infant or person of unsound mind*] had been originally made a party, and that you [*or the said infant or person of unsound mind*] may, on entering an appearance at the Central Office, attend the proceedings under the within mentioned judgment [*or order*] and that you [*or the said infant or person of unsound mind*] may within one month after the service of this notice apply to the Court to add to the judgment [*or order*].

[APPENDIX H.]

FORMS OF WRITS.

No. 1.—*Writ of Fieri Facias* (O. 43).18 . [*Here put the letter and number.*]

18 . B. No. .

In the High Court of Justice,
Division.

Between A. B., plaintiff,
and
C. D., defendant.

VICTORIA, by the grace of God, &c. of Great Britain and Ireland Queen,
Defender of the Faith.

To the sheriff of greeting :

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ and also interest thereon at the rate of £ per centum per annum from the day of ,* which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein A. B. is plaintiff and C. D. defendant [*or in a certain matter there*

* Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

depending intituled, “ In the matter of E. F.,” *as the case may be*] by a judgment [or order, *as the case may be*] of our said Court, bearing date the day of adjudged [or ordered, *as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in the said judgment [or order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing officers of our said Court at the sum of £ as appears by the certificate of the said taxing officer, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ [costs] together with interest thereon at the rate of £4 per centum per annum from the day of * and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment [or order, *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

No. 1A.—*Writ of Fieri Facias against a Married Woman.*

[*Note.*—This form is not part of the Appendix to the Rules.]

VICTORIA, &c.

We command you that of the goods and chattels of A. B. (being her separate property not subject to any restriction against anticipation as hereinafter mentioned) in your bailiwick, you cause to be made the sum of £ , and £ costs, and also interest thereon at the rate of £ per centum per annum from the [date of judgment], which said sums of money and interest were lately before us in our High Court of Justice in a certain action [or matter] there depending wherein [parties' names] by a judgment of our said court bearing date the , adjudged to be paid by the said A. B. to , out of her separate property not subject to any restriction against anticipation (unless by reason of section 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction), and that you have that money, &c. [as in Form 1].

No. 2.—*Fieri Facias on Order for Costs (O. 42, r. 18).*

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To the sheriff of greeting:

We command you, that of the goods and chattels of in your bailiwick you cause to be made the sum of £ for certain costs which by an order of our High Court of Justice dated the day of 18 were ordered to be paid by the said to and which have been taxed and allowed at the said sum, and interest on the said sum at the rate of 4l. per centum per annum from the day of 18 , and that you have the said sum and interest before us in our said Court,

* Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

immediately after the execution hereof, to be rendered to the said .
And in what manner, &c. And have there then this writ.

Witness, &c.

Levy £ and £ for costs of execution, &c., and also interest
on £ at 4l. per centum per annum from the day of 18
until payment; besides sheriff's poundage, officers' fees, costs of levy-
ing, and all other legal incidental expenses.

This writ was issued by, &c. of agent for of solicitor
for the

The is a and resides at in your bailiwick.

No. 3.—*Writ of Elegit* (O. 43).

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To the sheriff of greeting :

Whereas lately in our High Court of Justice in a certain action [*or*
certain actions, *as the case may be*] there depending, wherein A. B. is
plaintiff and C. D. defendant [*or* in a certain matter there depending, in-
titled "*In the matter of E. F.,*" *as the case may be*] by a judgment [*or*
order, *as the case may be*] of our said Court made in the said action [*or*
matter, *as the case may be*], and bearing date the day of it was
adjudged [*or* ordered, *as the case may be*] that C. D. should pay unto A. B.
the sum of £ together with interest thereon after the rate of £
per centum per annum from the day of together also with
certain costs as in the said judgment [*or* order, *as the case may be*] men-
tioned, and which costs have been taxed and allowed by one of the
taxing officers of our said Court, at the sum of £ as appears by the
certificate of the said taxing officer, dated the day of . And
afterwards the said A. B. came into our said Court, and according to the
statute in such case made and provided, chose to be delivered to him all
the goods and chattels of the said C. D. in your bailiwick, except his
oxen and beasts of the plough, and also all such lands, tenements, rec-
tories, tithes, rents, and hereditaments, including lands and heredita-
ments of copyhold or customary tenure, in your bailiwick as the said
C. D., or any one in trust for him, was seised or possessed of on the
day of in the year of our Lord or at any time afterwards,
or over which the said C. D. on the said day of or at any time
afterwards had any disposing power which he might without the assent
of any other person exercise for his own benefit, to hold to him the said
goods and chattels as his proper goods and chattels, and to hold the said
lands, tenements, rectories, tithes, rents, and hereditaments respectively,
according to the nature and tenure thereof, to him and to his assigns,
until the said two several sums of £ and £ together with inter-
est upon the said sum of £ at the rate of £ per centum per
annum from the said day of and on the said sum of £
(costs) at the rate of 4l. per centum per annum from the day
of shall have been levied. Therefore we command you that with-
out delay you cause to be delivered to the said A. B. by a reasonable
price and extent all the goods and chattels of the said C. D. in your baili-
wick, except his oxen and beasts of the plough, and also all such lands
and tenements, rectories, tithes, rents, and hereditaments, including lands
and hereditaments of copyhold or customary tenure, in your bailiwick
as the said C. D., or any person or persons in trust for him was or

were seised or possessed of on the said day of or at any time afterwards, or over which the said C. D. on the said day of , or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold the said goods and chattels to the said A. B., as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of £ and £ together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness, &c.

No. 4.—*Writ of Venditioni Exponas* (O. 43, r. 5).

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To the sheriff of greeting:

Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [*here recite the fieri facias to the end*]. And on the day of you returned to us in the Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore, we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said C. D., by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said A. B. And have there then this writ.

Witness, &c.

No 5.—*Writ of Fieri Facias de Bonis Ecclesiasticis* (O. 43, r. 5).

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To the Right Reverend Father in God [*John*] by Divine permission

Lord Bishop of greeting:

We command you, that of the ecclesiastical goods of C. D., clerk in your diocese, you cause to be made £ which lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein A. B. is plaintiff and C. D. is defendant [*or in a certain matter there depending, intituled "In the matter of E. F.," as the case may be*], by a judgment [*or order, as the case may be*] of our said Court bearing date the day of , was adjudged [*or ordered, as the case may be*] to be paid by the said C. D. to the said A. B., together with interest on the said sum of at the rate of £ per centum per annum, from the day of and have that money, together with

such interest as aforesaid, before us in our said Court immediately after the execution hereof, to be rendered to the said A. B., for that our sheriff of returned to us in our said Court on [or “at a day now past”] that the said C. D. had not any goods or chattels or any lay fee in his bailiwick whereof he could cause to be made the said £ and interest aforesaid or any part thereof, and that the said C. D. was a beneficed clerk (to wit) rector of rectory [or vicar of the vicarage] and parish church of , in the said sheriff’s county, and within your diocese [as in the return]. And in what manner, &c. And have you there then this writ.

Witness, &c.

No. 6.—*Writ of Fieri Facias to the Archbishop de bonis Ecclesiasticis during the vacancy of a Bishop’s See* (O. 43, r. 4).

VICTORIA, by the grace of God, &c.

To the Right Reverend Father in God [John] by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, greeting:

We command you, that of the ecclesiastical goods of C. D., clerk in the diocese of which is within the province of Canterbury, as ordinary of that church, the episcopal see of now being vacant, you cause to be made [&c., conclude as in the preceding form].

No. 7.—*Writ of Sequestrari Facias de bonis Ecclesiasticis* (O. 43, r. 5).

[Heading as in Form 1.]

VICTORIA, by the grace of God, &c.

To the Right Reverend Father in God [John] by Divine permission Lord Bishop of greeting:

Whereas we lately commanded our sheriff of that he should omit not by reason of any liberty of his county, but that he should enter the same, and cause [to be made, if after the return to a fieri facias, or delivered, if after the return to an elegit, &c., and in either case recite the former writ]. And whereupon our said sheriff of on [or “at a day past”] returned to us in the Division of our said Court of Justice, that the said C. D. was a beneficed clerk; that is to say, rector of the rectory [or vicar of the vicarage] and parish church of in the county of , and within your diocese, and that he had not any goods or chattels, or any lay fee in his bailiwick [here follow the words of the sheriff’s return]. Therefore, we command you that you enter into the said rectory [or vicarage] and parish church of , and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said £ and interest aforesaid, of the rents, tithes, rentcharges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said rectory [or vicarage] and parish church of and to the said C. D. as rector [or vicar] thereof to be rendered to the said A. B., and in what manner, &c.

And have you there then this writ.

Witness, &c.

No. 12.—*Writ of Attachment* (O. 44).[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To the sheriff of greeting :

We command you to attach C. D. so as to have him before us in the Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, &c.

No. 13.—*Writ of Sequestration* (O. 43).[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To [*names of not less than four Commissioners*] greeting :

Whereas lately in the Division of our High Court of Justice in a certain action there depending, wherein A. B. is plaintiff and C. D. and others are defendants [*or, in a certain matter then depending, intituled "In the matter of E. F.," as the case may be*] by a judgment [*or order, as the case may be*] of our said Court made in the said action [*or matter*], and bearing date the day of 187 , it was ordered that the said C. D. should [pay into Court to the credit of the said action the sum of l., *or, as the case may be*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D., and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours go to and enter upon all the messuages, lands, tenements, and real estates of the said C. D., and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall [pay into Court to the credit of the said action the sum of , *or, as the case may be,*] clear his contempt, and our said Court make other order to the contrary.

Witness, &c.

[APPENDIX J.]

FORMS OF SUBPÆNA, &c.

No. 1.—*Subpæna Ad Testificandum (General Form)* (O. 37, r. 27).

18 . [*Here put the letter and number.*]

In the High Court of Justice.

Division.

Between plaintiff,
 and
 defendant.

VICTORIA, by the grace of God, &c.

To [*the names of three witnesses may be inserted*] greeting :

We command you to attend before at on day
the day of 18 , at the hour of in the noon, and
so from day to day until the above cause is tried, to give evidence on
behalf of the plaintiff [*or defendant*].

Witness, &c.

No. 2.—*Habeas Corpus ad Testificandum* (O. 37, r. 27).

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To the [keeper of our prison at].

We command you that you bring who it is said is detained
in our prison under your custody before at on
day the day of 18 , at the hour of in the noon, and so
from day to day until the above action is tried, to give evidence on behalf
of the . And that immediately after the said shall have so
given his evidence you safely conduct him to the prison from which he
shall have been brought.

Witness, &c.

This writ was issued, &c.

No. 3.—*Subpæna Duces Tecum (General Form)* (O. 37, r. 27).

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To [*the names of three witnesses may be inserted*] greeting :

We command you to attend before at on day
the day of 18 , at the hour of in the noon, and
so from day to day until the above cause is tried, to give evidence on
behalf of the and also to bring with you and produce at the time
and place aforesaid [*specify documents to be produced*].

Witness, &c.

No. 4.—*Subpœna Ad Testificandum at Assizes* (O. 37, r. 27).

[Heading as in Form 1.]

VICTORIA, by the grace of God, &c.

To [*the names of three witnesses may be inserted*] greeting :

We command you to attend before our justices assigned to take the assizes in and for the county of to be holden at on day the day of 18 , at the hour of in the noon, and so from day to day during the said assizes until the above cause is tried, to give evidence on behalf of the .

Witness, &c.

No. 5.—*Subpœna Duces Tecum at Assizes* (O. 37, r. 27).

[Heading as in Form 1.]

VICTORIA, by the grace of God, &c.

To [*the names of three witnesses may be inserted*] greeting :

We command you to attend before our justices assigned to take the assizes in and for the county of to be holden at on day the day of 18 , at the hour of in the noon, and so from day to day during the said assizes, until the above cause is tried, to give evidence on behalf of the and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*].

Witness, &c.

No. 6.—*Subpœna Ad Testificandum at Sittings of High Court*
(O. 37, r. 27).

[Heading as in Form 1.]

VICTORIA, by the grace of God, &c.

To [*the names of three witnesses may be inserted*] greeting :

We command you to attend at the sittings of the Division of our High Court of Justice, for to be holden at on day the day of 18 , at the hour of in the noon, and so from day to day during the said sittings, until the above cause is tried, to give evidence on behalf of the .

Witness, &c.

No. 7.—*Subpœna Duces Tecum at Sittings of High Court*
(O. 37, r. 27).

[Heading as in Form 1.]

VICTORIA, by the grace of God, &c.

To [*the names of three witnesses may be inserted*].

We command you to attend at the sittings of the Division of our High Court of Justice for to be holden at on day the day of 18 , at the hour of o'clock in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*].

Witness, &c.

No. 11.—*Prohibition.*[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To the [judge of the County Court holden at] and to [name of
plaintiff] of greeting:

Whereas we have been given to understand that you the said have [entered a plaint against] C. D. in the said Court, and that the said Court has no jurisdiction in the said [cause] or to hear and determine the said [plaint] by reason that [*state facts showing want of jurisdiction*].

We therefore hereby prohibit you from further proceeding in the said [action] in the said Court.

Witness, &c.

This writ was issued by, &c.

No. 13.—*Commission to Examine Witnesses* (O. 37, r. 6).[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c.

To of and of Commissioners named by and
on behalf of the and to of and of
Commissioners named by and on behalf of the greeting:

Know ye that we in confidence of your prudence and fidelity have appointed you and by these presents give you power and authority to examine on interrogatories and *vivâ voce* as hereinafter mentioned witnesses on behalf of the said and respectively at before you or any two of you, so that one Commissioner only on each side be present and act at the examination.

And we command you as follows:

1. Both the said and the said shall be at liberty to examine on interrogatories and *vivâ voce* on the subject-matter thereof or arising out of the answers thereto, such witnesses as shall be produced on their behalf, with liberty to the other party to cross-examine the said witnesses on cross-interrogatories and *vivâ voce*, the party producing any witness for examination being at liberty to re-examine him *vivâ voce*; and all such additional *vivâ voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and with the answers thereto shall be returned with the said Commission.

2. Not less than days before the examination of any witness on behalf of either of the said parties, notice in writing, signed by any one of you, the Commissioners of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination and the names of the witnesses to be examined, shall be given to the Commissioners of the other party by delivering the notice to them, or by leaving it at their usual place of abode or business, and if the Commissioners or Commissioner of that party neglect to attend pursuant to the notice, then one of you, the Commissioners of the party on whose behalf the notice is given, shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination,

or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition to part with the original thereof, then a copy thereof, or extract therefrom, certified by the Commissioners or Commissioner present and acting to be a true and correct copy or extract shall be annexed to the witnesses' deposition.

4. Each witness to be examined under this Commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the Commissioners or Commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *voir dire* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the Commissioners or Commissioner present at the examination, and to be previously sworn according to his or their several religions by or before the said Commissioners or Commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this Commission shall be subscribed by the witness or witnesses, and by the Commissioners or Commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof, or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the day of enclosed in a cover under the seals or seal of the Commissioners or Commissioner.

8. Before you or any of you in any manner act in the execution hereof you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences. In the absence of any other Commissioner, a Commissioner may himself take the oath.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, &c.

This writ was issued by, &c.

Witnesses' Oath.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

Commissioners' Oath.

You [*or I*] shall, according to the best of your [*or my*] skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the Commission within written. So help you [*or me*] God.

Interpreter's Oath.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations, which he shall administer to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the Commissioners named in the Commission within written,

as far forth as you are directed and employed by the said Commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

Clerk's Oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said Commissioners named in the Commission within written, as far forth as you are directed and employed by the Commissioners to take, write down, transcribe or engross the said questions and depositions. So help you God.

Direction of interrogatories, &c. when returned by the Commissioners.

THE SENIOR MASTER OF THE SUPREME COURT OF JUDICATURE,
ROYAL COURTS OF JUSTICE, LONDON.

No. 14.—*Commission to Examine Witnesses* (O. 37, Pt. II.).

18 . [*Here put the letter and number.*]

In the High Court of Justice,
Probate, Divorce, and Admiralty Division.

Between A. B., plaintiff,
and
the owners of the .

Victoria, by the grace of God, &c., to [*state name and address of examiner or commissioner appointed*], greeting. Whereas in an action of commenced in our said High Court of Justice on behalf of against [and against intervening], the judge has ordered a commission to be issued for the examination of witnesses concerning the truth of the matters at issue in the said cause. We therefore hereby authorize you, upon the day of 18 at in the presence of the solicitors in the said action, or in the presence of their or either of their lawfully appointed substitutes, or otherwise notwithstanding the absence of either of them, to swear the witnesses who shall be produced before you for examination in the said cause, and cause them to be examined, and their depositions to be reduced into writing. We further authorize you to adjourn (if necessary) the said examinations from time to time and from place to place, as you may find expedient. And we command you, upon the examinations being completed, to transmit the depositions and the whole proceedings had and done before you, together with this commission, to the Registry of the said Division of our said Court.

Witness, &c.

Commission to examine
Taken out by .

witnesses.

E. F., Registrar.

[APPENDIX K.]

(SUMMONSES AND ORDERS.)

No. 1.—*Summons (General Form)* (O. 54, r. 10).

In the High Court of Justice. 18 . [Here put the letter and number.]
 Division.

Between plaintiff,
 and
 defendant.

Let all parties concerned attend the Judge [or Master] in Chambers
 [Central Office, Royal Courts of Justice, Strand, London] on day the
 day of 18 at o'clock in the noon, on the hearing
 of an application on the part of .

Dated the day of 18 .

This summons was taken out by of solicitor for .

To .

No. 2.—*Order (General Form)* (O. 54, r. 29).

[Heading as in Form 1.]

* Judge [or Master] in Chambers.

Between .

Upon hearing and upon reading the affidavit of filed the
 day of 18 and

It is ordered and that the costs of this application be .

Dated the day of 18 .

* Insert name
 of Judge or
 Master.

No. 5.—*Order for Time* (O. 52, r. 14).

[Heading as in Form 1.]

Upon hearing , and upon reading the affidavit of filed the
 day of 18 and

It is ordered that the shall have time and that the costs of
 this application be .

Dated the day of 18 .

No. 10.—*Order to Amend* (O. 28, r. 1).

[Heading as in Form 1.]

Upon hearing and upon reading the affidavit of filed the
 day of 18 , and

It is ordered that the plaintiff be at liberty to amend the writ of sum-
 mons in this action by and that the costs of this application be .

Dated the day of 18 .

No. 12.—*Order for Particulars (General)* (O. 19, r. 7).[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed the
day of 18 , and

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the plaintiff's claim in this action, and that unless such particulars be delivered within days from the date of this order all further proceedings be stayed until the delivery thereof, and that the costs of this application be .

Dated the day of 18 .

No. 12A.—*Order for Particulars of Counterclaim* (O. 19, r. 7).[*Heading as in Form 1.*]

Upon hearing , and upon reading the affidavit of filed the
day of 18 , and

It is ordered that the defendant do within days deliver to the plaintiff's solicitor or agent particulars of the said defendant's set-off (Counterclaim) that in default the said defendant be precluded from giving evidence in support thereof on the trial of this action and that the costs of this application be .

Dated the day of 18 .

[Additional form prescribed for official use under O. 61, r. 33.]

No. 15.—*Order to Dismiss for want of Prosecution* (O. 27, r. 1).[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed the
day of 18 and

It is ordered that this action be, for want of prosecution, dismissed with costs to be taxed and paid to the defendant by the plaintiff, and that the costs of this application be .

Dated the day of 18 .

No. 16.—*Order for Delivery of Interrogatories* (O. 31, r. 1).[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed the
day of 18 and

It is ordered that the be at liberty to deliver to the interrogatories in writing, and that the said do answer the interrogatories as prescribed by Order XXXI. Rules 8 and 26 of the Rules of the Supreme Court, and that the costs of this application be .

Dated the day of 18 .

No. 17.—*Order for Affidavit as to Documents* (O. 31, r. 12).

[Heading as in Form 1.]

Upon hearing

It is ordered that the do, within days from the date of this order answer on affidavit stating what documents are or have been in possession or power relating to the matters in question in this action, and that the costs of this application be .

Dated the day of 18 .

No. 18.—*Order to produce Documents for Inspection* (O. 31, r. 14).

[Heading as in Form 1.]

Upon hearing and upon reading the affidavit of filed the day of 18 and

It is ordered that the do, at all seasonable times, on reasonable notice, produce at [insert place of inspection], situate at the following documents, namely and that the be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof and extracts therefrom, at expense, and that in the meantime all further proceedings be stayed, and that the costs of this application be .

Dated the day of 18 .

No. 20.—*Order for Service out of Jurisdiction* (O. 11).

In the High Court of Justice,
Division.

The Hon. Mr. Justice , Judge in Chambers.

In the matter of the Judicature Acts, 1873—1875, and in the matter of an intended action.

Between plaintiff,
and
defendant.

Upon [hearing and upon] reading the affidavit of filed herein,

It is ordered that the intended plaintiff be at liberty to issue a writ [for service out of the jurisdiction] of summons against the intended defendant.

And it is further ordered that the said intended plaintiff be at liberty to serve [If a foreigner in a foreign country insert "Notice of"] the said writ at [Here insert country or place within the limits of which the service is to be made], or elsewhere in the and that the time for appearance to the said writ be within after the service [thereof] of the said [Here insert "Writ" or "Notice of" as may be required].

Dated the day of 18 .

No. 21.—*Order for Substituted Service* (O. 10).[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed the
 day of 18 and

It is ordered that service of a copy of this order, and of a copy of the writ of summons in this action, by sending the same by a prepaid post letter, addressed to the defendant at shall be good and sufficient service of the writ.

Dated the day of 18 .

No. 22.—*Order for Renewal of Writ* (O. 8, r. 1).[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed the
 day of 18 and

It is ordered that the writ in this action be renewed for six months from the date of its renewal, pursuant to the Rules of the Supreme Court, O. 8, r. 1.

Dated the day of 18 .

No. 27.—*Order charging Stock—Nisi* (O. 46, r. 1).[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed
 the day of , 18 , whereby it appears *that the plaintiff*
recovered a judgment against the defendant on the day of , 18 ,
for the sum of £ *and £* *costs, that the said defendant is still*
indebted to the plaintiff in the said sums so recovered, and that there is
standing in

It is ordered that unless sufficient cause be shown to the contrary before the Judge in Chambers, Central Office, Royal Courts of Justice, Strand, London, on day the day of , 18 , at o'clock in the forenoon, the defendant's interest in the so standing as aforesaid shall, and that it in the meantime do, stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the day of , 18 .

[*Note.*—The original form has been amended in pursuance of O. 61, r. 33, by the addition of the words in italics.]

No. 28.—*Order charging Stock—Absolute* (O. 46, r. 1).[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed
 the day of , 18 , and an order nisi made herein on the
 day of , 18 , reciting the affidavit of whereby it
 appeared that the plaintiff recovered a judgment against the defendant
 on the day of , 18 , for the sum of £ and £ costs,

that the said defendant is still indebted to the plaintiff in the said sums so recovered, and that there is standing in

It is ordered that the defendant's interest in the so standing as aforesaid stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the day of , 18 .

[*Note.*—The original form has been amended in pursuance of O. 61, r. 33, by the addition of the words in italics.]

No. 29.—*Charging Order. Solicitor's Costs.*

[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed the
day of 18 and

It is ordered that the said the solicitor for the in this action
shall have a charge upon for his costs, charges, and expenses of
and in reference to this action.

Dated the day of 18 .

No. 30.—*Order to remove Judgment from County Court.*

18 . [*Here put the letter and number.*]

In the High Court of Justice.
Division.

Y.

Master in Chambers.

In the matter of a plaint in the County Court of holden at
wherein plaintiff, and defendant.

Upon reading the affidavit of filed the day of 18
and and the certified copy of the judgment in the plaint above-mentioned,

It is ordered that a writ of certiorari issue to remove the said judgment from the above-named County Court into the Division of the High Court of Justice.

Dated the day of 18 .

No. 36.—*Short Order for Issue of Commission to Examine Witnesses* (O. 37, r. 6).

[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed the
day of 18 and

It is ordered that the be at liberty to issue a commission for the
examination of witnesses on behalf at .

And it is further ordered that the trial of this action be stayed until the return of the said commission, [the usual long order to be drawn up, and unless agreed upon by the parties within one week, to be settled by the Master [*or as the case may be*],] and that the costs of this application be

Dated the day of 18 .

B.

No. 37.—*Long Order for Commission to Examine Witnesses.*

[Heading as in Form 1.]

Upon hearing and upon reading the affidavit of filed the
 day of 18 and

It is ordered as follows:

1. A commission may issue directed to of and of
 commissioners named by and on behalf of the and to
 of and of commissioners named by and on behalf of the
 for the examination upon interrogatories and *vivâ voce* of witnesses
 on behalf of the said and respectively at aforesaid before
 the said commissioners, or any two of them, so that one commissioner
 only on each side be present and act at the examination.

2. Both the said and shall be at liberty to examine upon
 interrogatories and *vivâ voce* upon the subject matter thereof or arising
 out of the answers thereto such witnesses as may be produced on their
 behalf, with liberty to the other party to cross-examine the said witnesses
 upon cross-interrogatories and *vivâ voce* the party producing the witness
 for examination being at liberty to re-examine him *vivâ voce*; and all such
 additional *vivâ voce* questions, whether on examination, cross-examina-
 tion, or re-examination, shall be reduced into writing, and, with the
 answers thereto, returned with the said commission.

3. Within days from the date of this order the solicitors or
 agents of the said and shall exchange the interrogatories they
 propose to administer to their respective witnesses, and shall also within
 days from the exchange of such interrogatories, exchange copies
 of the cross-interrogatories intended to be administered to the said
 witnesses.

4. days previously to the sending out of the said commission,
 the solicitor of the said shall give to the solicitor of the
 said notice in writing of the mail or other conveyance by which the
 commission is to be sent out.

5. days previously to the examination of any witness on behalf
 of the said or respectively, notice in writing signed by any
 one of the commissioners of the party on whose behalf the witness is to
 be examined and stating the time and place of the intended examination,
 and the names of the witnesses intended to be examined, shall be given
 to the commissioners of the other party by delivering the notice to them
 personally, or by leaving it at their usual place of abode or business, and
 if the commissioners of that party neglect to attend pursuant to the
 notice, then one of the commissioners of the party on whose behalf the
 notice is given shall be at liberty to proceed with and take the examina-
 tion of the witness or witnesses *ex parte*, and adjourn any meeting or
 meetings, or continue the same, from day to day until all the witnesses
 intended to be examined by virtue of the notice have been examined,
 without giving any further or other notice of the subsequent meeting or
 meetings.

6. In the event of any witness on his examination, cross-examination,
 or re-examination, producing any book, document, letter, paper, or
 writing, and refusing for good cause to be stated in his deposition, to
 part with the original thereof, then a copy thereof, or extract therefrom,
 certified by the commissioners or commissioner present to be a true and
 correct copy or extracts shall be annexed to the witness's deposition.

7. Each witness to be examined under the commission shall be exa-
 mined on oath, affirmation, or otherwise in accordance with his religion
 by or before the said commissioners or commissioner.

8. If any one or more of the witnesses do not understand the English
 language (the interrogatories, cross-interrogatories, and *vivâ voce* ques-

tions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto.

9. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions.

10. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof, or extracts therefrom, shall be sent to the senior Master of the Supreme Court of Judicature on or before the day of , or such further or other day as may be ordered, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence on the trial of this action by and on behalf of the said and respectively, saving all just exceptions, without any other proof of the absence from this country of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the said or respectively, as to his belief of the .

11. The trial of this cause is to be stayed until the return of the said commission.

12. The costs of this order, and of the commission to be issued in pursuance hereof, and of the interrogatories, cross-interrogatories, and depositions to be taken thereunder, together with any such document, copy, or extract as aforesaid, and official copies thereof, and all other costs incidental thereto, shall be .

Dated the day of 18 .

No. 37A.—*Order for Issue of Request for Commission* (O. 37, r. 6A).

It is ordered that a letter of request do issue directed to the proper tribunal for the examination of the following witnesses, that is to say:

E. F., of , G. H., of , and I. J., of .

And it is ordered that the depositions taken pursuant thereto when received be filed at the central office, and be given in evidence on the trial of this action, saving all just exceptions.

No. 37B.—*Request for Commission* (O. 37, r. 6A).

[*Heading:—To the President and Judges of, &c., &c., or as the case may be.*]

Whereas an action is now pending in the Division of the High Court of Justice in England, in which A. B. is plaintiff and C. D. is defendant. And in the said action the plaintiff claims (endorsement upon writ).

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say:

E. F., of , G. H., of , and I. J., of .

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court.

[Note.—If the Request is directed to a British Colony, the words "The Colonies" should be substituted for "Foreign Affairs."]

[Additional Form prescribed under O. 61, r. 33.]

No. 38.—*Order for Examination of Judgment Debtor* (O. 42, r. 32).18 . [*Here put the letter and number.*]In the High Court of Justice.
Division.Between Judgment creditor,
and
Judgment debtor.Upon hearing and upon reading the affidavit of , filed the
day of , 18 , and

It is ordered that the above-named judgment debtor attend and be orally examined as to whether any and what debts are owing to him, before in chambers, at such time and place as he may appoint, and that the said judgment debtor produce his books [*or as may be ordered*] before the said at the time of the examination, and that the costs of this application be

Dated the day of 18 .

No. 39.—*Garnishee Order (Attaching Debt)* (O. 45, r. 1).18 . [*Here put the letter and number.*]In the High Court of Justice.
Division.In Chambers.
Between Judgment creditor,
and
Judgment debtor,
Garnishee.Upon hearing and upon reading the affidavit of , filed the
day of , 18 , and

It is ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of , 18 , for the sum of , on which judgment the said sum of £ remains due and unpaid.

And it is further ordered that the said garnishee attend the in Chambers on day the day of , 18 , at o'clock in the noon, on an application by the said judgment creditor, that the said garnishee pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment.

And that the costs of this application be .
Dated the day of 18 .No. 40.—*Garnishee Order (Absolute)* (O. 45, r. 3).[*Heading as in No. 39.*]

Upon hearing and upon reading the affidavit of filed the
day of 18 , and whereby it was ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of ,

18 , for the sum of £ , on which judgment the said sum of £ remained due and unpaid.

It is ordered that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same, and that the costs of this application be

Dated the day of 18 .

No. 40A.—*Order for Issue between Judgment Creditor and Garnishee*
(O. 45, r. 4).

[*Heading as in No. 39.*]

Upon hearing the solicitors for the judgment creditor and the garnishee, and reading the affidavit of , and the order nisi herein, dated the day of , 18 .

It is ordered that the judgment creditor and the garnishee proceed to the trial of an issue wherein the said judgment creditor shall be plaintiff and the said garnishee shall be defendant, and that the question to be tried shall be whether the said garnishee was indebted to the judgment debtor in any and what amount at the time the said order nisi was served. And it is further ordered that the issue be prepared and delivered by the plaintiff therein within ten days from this date and be returned by the defendant therein within seven days and be tried at , and that the question of costs and all further questions be reserved until the trial of the said issue.

Dated the day of , 18 .

[Additional Form prescribed for official use under O. 61, r. 33.]

No. 40B.—*Order to deliver Bill of Costs.*

18 , , No.

In the High Court of Justice,
Queen's Bench Division.

Master .

Master in Chambers.

In the matter of gentlem , of the solicitors of the Supreme Court.

Upon hearing the solicitors for and for , and upon reading the affidavit of , filed this day of , 18 .

It is ordered that the said do within seven days deliver to the said , or to his solicitor, a bill of costs in all causes and matters wherein he has been concerned for the said , and that he give credit therein for all moneys received by him from or on account of the said .

Dated this day of , 18 .

[This is an additional form prescribed for official use under O. 61, r. 33.]

No. 41.—*Order on Client's Application to Tax Solicitor's Bill of Costs.*

In the High Court of Justice.

Division.

in Chambers.

In the matter of the taxation of costs, and in the matter of
gentleman, one of the solicitors of the Supreme Court.

Upon hearing, &c.

It is ordered that the bill of fees, charges, and disbursements delivered to the applicant by the above-named solicitor be referred to the taxing officer to be taxed, and that the said solicitor give credit for all sums of money by him received of or on account of the applicant, and that he refund what (if anything) he may on such taxation appear to have been overpaid.

And it is further ordered that the taxing officer tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be charged [if payable] according to the event of the taxation, pursuant to the statute.

And it is further ordered that [*if the said solicitor attends on the taxation*] the said solicitor do not commence or prosecute any cause or matter touching the demand pending the reference.

And it is further ordered that upon payment by the applicant of what (if anything) may appear to be due to the said solicitor the said solicitor do (if required) deliver up to the applicant, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the applicant.

Dated the day of , 18 .

[The words in italics "if the said solicitor attends on the taxation" are inserted in this form by mistake, as under 6 & 7 Vict. c. 73, s. 37, on the client's application to tax, the costs of the reference are always directed to be taxed, and it is only where the solicitor applies for an order to tax, that it depends on whether the client attends on the taxation whether the costs of reference ought to be taxed. The words are omitted from the forms now in official use.]

No. 42.—*Order on Solicitor's Application to tax Bill of Costs.*

In the High Court of Justice.

Division.

in Chambers.

In the matter of the taxation of costs, and in the matter of
gentleman, one of the solicitors of the Supreme Court.

Upon hearing , and upon reading the affidavit of , filed
the day of , 18 .

It is ordered that the above-named solicitor's bill of fees, charges, and disbursements, delivered to (hereinafter called the said client) be referred to the taxing officer to be taxed, and that the said solicitor give credit for all sums of money by him received from or on account of the said client, and that he refund what (if anything) he may on such taxation appear to have been overpaid.

And it is further ordered that if the said client shall attend upon such taxation the taxing officer tax the costs of the reference and certify what

shall be found due to or from either party in respect of the bill and demand and of the costs of the reference to be paid according to the event of the taxation pursuant to the statute.

And it is further ordered that the said solicitor do not commence or prosecute any cause or matter touching the demand pending the reference.

And it is further ordered that upon payment by the said client of what (if anything) may appear to be due to the said solicitor the said solicitor do (if required) deliver to the said client, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the said client.

Dated the day of , 18 .

[The words "if the said client attends on taxation" were not included in the original form, but they are rightly added to forms now in use. See note to Form No. 41, *supra*.]

No. 43.—*Order to Tax after Action brought.*

[*Heading as in Form 1.*]

Upon hearing , and upon reading the affidavit of . filed the day of 18 , and

It is ordered that the plaintiff's bill of costs, charges, and disbursements delivered to the defendant, for the recovery of which this action is brought, be referred to the taxing officer to be taxed, and that the plaintiff give credit at the time of taxation for all sums of money by him received from or on account of the defendant.

And it is further ordered that the taxing officer tax the costs of the reference, and certify what upon such reference shall be found due to or from either party in respect of the bill and demand, and of the costs of the reference, pursuant to the statute.

And it is further ordered that the plaintiff do not prosecute this action touching the demand pending the reference.

And it is further ordered that upon payment of what (if anything) may appear to be due to the plaintiff, together with the costs of this action (which are to be also taxed and paid), all further proceedings therein be stayed, and that the costs of this application be

Dated the day of 18 .

No. 44.—*Order to try Action in County Court.*

[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of , filed the day of 18 , and

It is ordered that this action be tried before the County Court of holden at , and that the costs of this application be

Dated the day of 18 .

No. 45.—*Order to give Security or try Action in County Court.*

[Heading as in Form 1.]

Upon hearing and upon reading the affidavit of , filed the
day of 18 , and

It is ordered that unless the plaintiff within give full security for
the defendant's costs to the satisfaction of the Master [*or as the case may*
be], this action be remitted for trial before the County Court of
holden at and that the costs of this application be

Dated the day of 18 .

No. 57.—*Order Dismissing Summons (generally).*

[Heading as in Form 1.]

Upon hearing and upon reading the affidavit of filed
the day of 18 , and

It is ordered that the application of be dismissed* with costs to
be taxed and paid by the to the [*or, and that the costs of and*
occasioned by this application be the 's in any event].

Dated the day of 18 .

No. 61.—*Order to bring up Witness in Criminal Custody (16 & 17
Vict. c. 30, s. 9).*

[Heading as in Form 1.]

Upon reading the affidavit of .

It is ordered that the keeper of her Majesty's prison at shall
have before , on the day of , 18 , at o'clock
in the forenoon, the body of , a prisoner in his custody (as it is
said), then and there to testify the truth and give evidence in this ,
on behalf of , and so on from day to day until his attendance as
such witness shall be no longer required, and thereupon he be taken back
without delay to the said prison and there detained until he be discharged
by due course of law.

Dated the day of , 18 .

No. 62.—*Receiver Order (Interim) (Jud. Act, 1873, s. 25, sub-s. 8 ;
O. 50, r. 6).*

[Heading as in Form 1.]

Upon the application of for the plaintiff and the plaintiff by
his undertaking to be answerable for all sums to be received by
the receiver hereinafter named.

It is ordered that be appointed without security until the
day of next inclusive or further order to receive the rents and
profits of , but without prejudice to the rights of any prior incum-
brancer or his possession (if any) and the tenants of the said estate are
(without prejudice as aforesaid) to attorn and pay their rents in arrear

and growing rents to the said so long as he shall continue to be such receiver, and that all questions as to passing his accounts and payments thereunder and all further questions be reserved until further order.

Defendant to be at liberty to apply in meantime.

Dated the day of , 18 .

No. 63.—*Receiver Order* (Jud. Act, 1873, s. 25, sub-s. 8 ;
O. 50, r. 6).

[*Heading as in Form 1.*]

Upon hearing for the plaintiff, and upon reading the affidavit of

It is ordered that be appointed receiver upon first giving security by bond to the satisfaction of one of the Masters of the Supreme Court of Judicature [*or* “the District Registrar,” *as the case may be*] to receive the rents, profits, and moneys, receivable in respect of the following property (that is to say) :

But this appointment is to be without prejudice to the rights of any prior incumbrancers upon the said premises, who may think proper to take possession of or receive the same by virtue of their respective securities, or, if any prior incumbrancer is in possession, then without prejudice to such possession.

And that the tenants of the said premises do attorn and pay their rents in arrear and growing rents to such receiver. And that such receiver have liberty, if he shall think proper (but not otherwise), out of the rents, profits, and moneys to be received by him, to keep down the interest upon the prior incumbrances, according to their priorities, and be allowed such payments (if any) in passing his accounts, and that such receiver shall on the* day of next, and at such further and other times as may be ordered by the master [*or*, “district registrar”], leave and pass such accounts, and shall on the† day of next, and at such further and other times as may be hereafter ordered by the master [*or*, “district registrar”] pay the balance or balances appearing due on the accounts so left or such part thereof as shall be certified as proper to be so paid ; such sums to be paid in or towards satisfaction of what shall for the time being be due in respect of the judgment signed on the day of for the sum of £ debt, and £ for costs, making together the sum of £ ; and that the costs of this order and of carrying the same into effect and of obtaining the discharge of the receiver (such costs to be ascertained by the master [*or*, “district registrar”]) shall be primarily payable out of the sums received by the receiver, but if there shall be no sums received or the amount shall be insufficient, then upon the certificate of the master [*or*, “district registrar”] being given stating the amount of the deficiency (such certificate to be given after passing the final account), the amount of the deficiency so certified shall be paid by the judgment debtor to the judgment creditor.

It is further ordered that the balance (if any) remaining in the hands of the receiver, after making the several payments aforesaid, shall forthwith be paid by the receiver into Court to the credit of this action, subject to further order.

And any of the parties are to be at liberty to apply to the Judge in Chambers as there may be occasion.

Dated this day of 18 .

* 3 months.

† 1 month after
the 3 months.

No. 64.—*Order for Deposit of Securities or Effects* (O. 50).

[Heading as in Form 1.]

Upon hearing

It is ordered that the [plaintiff or defendant] on or before the day of 18 place in a box in the presence of the solicitors of the [defendant or plaintiff].

The [here describe the articles sufficiently for identification] such box to be endorsed "In the High Court of Justice, Queen's Bench Division [title of cause with distinguishing mark, 18,] and to be sealed in the presence of the solicitors of the plaintiff and defendant. And the on or before the day of 18, is to deposit such sealed box in Court, and the same is not to be opened or removed without the further order of the Court [or a judge], and that the costs of this application be .

Dated the day of 18 .

No. 65.—*Order allowing Inspection of Securities or Effects* (O. 50).

[Heading as in Form 1.]

Ledger credit to which lodged.

Upon hearing

It is ordered that the sealed box endorsed—

"IN THE HIGH COURT OF JUSTICE,

"QUEEN'S BENCH DIVISION,

" v.

" 18 ."

deposited in Court and lodged to the above ledger credit at the Bank of England (Law Courts Branch) on account of the Paymaster-General for and on behalf of the Supreme Court of Judicature pursuant to an order of the Court [or a judge] dated the day of 18, be delivered out to the senior clerk for the time being of the General Filing Department of the Central Office of the High Court of Justice, and that be allowed to open the said box in the said General Filing Department under the superintendence of an officer of that department, and to inspect the contents of such box under the same superintendence. And that after such inspection the same be re-sealed by the parties in the presence of the said officer and be re-deposited by such senior clerk at the Bank of England to the credit and account aforesaid, subject to the further order of the Court [or a judge] and that the costs of this application be .

Dated the day of 18 .

No. 66.—*Order for Interim Injunction* (Jud. Act, 1873, s. 25, sub-s. 8; O. 50, r. 6).

[Heading as in Form 1.]

Upon hearing for the plaintiff and upon reading the affidavit of , filed the day of 18, and the plaintiff by his said undertaking to abide by any order the Court or a judge may make as to damages in case the Court or a judge should hereafter be of opinion that the defendant shall have sustained any by reason of this order which the plaintiff ought to pay. It is ordered and

directed that the defendant his agents and servants and
 every of them be restrained and an injunction is hereby granted restrain-
 ing them and every of them from until after the trial of this
 action or until further order.

Dated the day of 18 .

No. 67.—*Order to Try by Jury* (O. 36, rr. 2-7).

[*Heading as in Form 1.*]

Upon hearing the solicitors on both sides .
 It is ordered that this action be tried with a jury.
 And that the costs of this application be .
 Dated the day of 18 .

[APPENDIX N.]

COSTS (O. 65, rr. 8—10).

WRITS, SUMMONSES, AND WARRANTS.	Higher Scale.	Lower Scale.
	£ s. d.	£ s. d.
Writ of summons for the commencement of any action	0 13 4	0 6 8
And for indorsement of claim, if special	0 5 0	0 5 0
Concurrent writ of summons	0 6 8	0 6 8
Renewal of a writ of summons	0 6 8	0 6 8
Notice of a writ for service in lieu of writ out of jurisdiction	0 5 0	0 4 0
Writ of inquiry	1 1 0	1 1 0
Writ of mandamus	1 1 0	0 10 0
Or per folio	0 1 4	0 1 4
Writ of subpoena ad testificandum or duces tecum..	0 6 8	0 6 8
And if more than four folios, for each folio beyond four	0 1 4	0 1 4
Writ or writs of subpoena ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three	0 6 8	0 6 8
Writ of distringas, pursuant to statute 5 Vict. c. 5..	0 13 4	0 13 4
Writ of execution, or other writ to enforce any judgment or order	0 10 0	0 7 0
And if more than four folios, for each folio beyond four	0 1 4	0 1 4
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0 6 8	0 6 8
Notice thereof to serve on sheriff	0 5 0	0 4 0
Any writ not included in the above	0 10 0	0 7 0
These fees include all indorsements and copies, or præcipes, for the officer sealing them, and attendances to issue or seal, except where otherwise provided, but not the Court fees.		
Summons to attend at judges' chambers	0 6 8	0 3 0
Or if special, at taxing officer's discretion, not exceeding	1 1 0	0 13 4
Copy for the judge, when required	0 2 0	0 2 0
Or per folio	0 0 4	0 0 4
Originating summons for proceedings in chambers in the Chancery Division at taxing officer's discretion, not exceeding	1 1 0	1 1 0
And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped	0 13 4	0 13 4
Copy for the judge	0 2 0	0 2 0
Or per folio	0 0 4	0 0 4
Indorsing same and copies under Order LV., Rule 22	0 6 8	0 6 8

SERVICES AND NOTICES.	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
Service, or filing in lieu of service, of any writ, summons, warrant, interrogatories, petition, order, or notice on a party who has not entered an appearance, and if not authorised to be served by post..	0	5	0	0	5	0
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0	1	0	0	1	0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition	0	7	0	0	7	0
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.						
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.						
Service where an appearance has been entered on the solicitor or party	0	2	6	0	2	6
Or if authorised to be served by post	0	1	6	0	1	6
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.						
In addition to the above fees, the following allowances are to be made:—						
As to writs, if exceeding two folios, for copy for service, per folio beyond such two	0	0	4	0	0	4
As to summons to attend at the judges' chambers, for each copy to serve	0	2	0	0	1	0
Or per folio	0	0	4	0	0	4
As to notices in proceedings to wind up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributories	0	1	0	0	1	0
And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call	0	1	0	0	1	0
And for drawing notice to be served on contributories or creditors of a meeting, per folio	0	1	0	0	1	0
For each copy of the last-mentioned notice to serve, per folio	0	0	4	0	0	4
For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any	0	1	0	0	1	0
For preparing notice to produce on the trial or hearing of an action, or notice to admit	0	7	6	0	5	0
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0	1	0	0	0	8
And for each copy, such allowance as the taxing officer shall think proper, not exceeding per folio	0	0	4	0	0	4
For preparing notice of motion	0	5	0	0	3	0
Or per folio	0	1	0	0	1	0

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
Copy for service	0	1	0	0	1	0
Or per folio	0	0	4	0	0	4
For preparing any necessary or proper notice, not otherwise provided for, or any demand, pursuant to O. VII., rr. 1 and 2	0	1	6	0	1	6
Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three..	0	1	0	0	1	0
And for each copy for service, per folio beyond such three	0	0	4	0	0	4
Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio	0	0	4	0	0	4
Except as otherwise provided, the allowances for services include copies for service.						
Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.						
In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than 3 <i>l</i> .						
Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.						

APPEARANCES.

Entering any appearance	0	6	8	0	6	8
If entered at one time, for more than one person, for every defendant beyond the first	0	2	0	0	1	0
If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above	0	6	8	0	6	8

INSTRUCTIONS.

To sue or defend	0	13	4	0	6	8
For statement of claim or special case	2	2	0	0	13	4
For indorsement of writ of summons when no further statement of claim	1	1	0	0	13	4
For originating summons 6 <i>s</i> . 8 <i>d.</i> , or not to exceed	1	1	0	1	1	0
For defence or further defence	0	13	4	0	6	8
For counter claim	0	13	4	0	6	8
For reply when defendant sets up a counter claim	1	1	0	0	13	4
For reply or further reply in any other case with or without joinder of issue	0	13	4	0	6	8
For confession of defence	0	13	4	0	6	8
For joinder of issue without other matter	0	13	4	0	6	8
For special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness	0	13	4	0	6	8
To amend any pleading	0	13	4	0	6	8
For affidavit in answer to interrogatories, and other special affidavits	0	6	8	0	6	8

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
To appeal against order of Court or judge, and to appear thereon.....	1	1	0	0	13	4
To add parties by order of Court or judge	0	13	4	0	6	8
For counsel to advise on evidence when the evidence in chief is to be taken orally	0	6	8	0	6	8
Or not to exceed	1	1	0	1	1	0
For counsel to make any application to a Court or judge where no other brief	0	10	0	0	6	8
For brief on motion for special injunction	1	1	0	0	13	4
For brief on hearing or trial of action upon notice of trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages..	2	2	0	1	1	0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.						
The fees for instructions for brief are to apply to a hearing on further consideration in Court only where an order for accounts and inquiries was made without such hearing or trial, as above mentioned.						

DRAWING PLEADINGS AND OTHER DOCUMENTS.

Statement of claim	1	1	0	0	10	0
Or per folio	0	1	0	0	1	0
Defence	0	10	0	0	5	0
Or per folio	0	1	0	0	1	0
Counterclaim	1	1	0	0	5	0
Or per folio	0	1	0	0	1	0
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, and any other pleading (not being a petition or summons) and amendments of any pleading	0	10	0	0	5	0
Or per folio	0	1	0	0	1	0
Particulars, breaches, and objections, when required, and one copy to deliver	0	6	8	0	5	0
Or such amount as the taxing officer shall think fit, not exceeding per folio	0	1	0	0	0	8
If more than one copy to be delivered, for each other copy, per folio	0	0	4	0	0	4
Special case, whether original or in an action, affidavits in answer to interrogatories and other special affidavits, special petitions, and interrogatories, per folio	0	1	0	0	1	0
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, special case and petition before a Court or judge, sheriff, commissioner, referee, examiner, or officer of the court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio	0	1	0	0	1	0

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
Brief on application to add parties	0	10	0	0	6	8
Or per folio	0	1	0	0	1	0
Brief on further consideration, per sheet of 10 folios	0	6	8	0	6	8
Accounts, statements, and other documents for the Judge's Chambers, when required, not exceeding per folio	0	1	0	0	0	8
Advertisements to be signed by judge's clerk, in- cluding attendance therefor	0	13	4	0	6	8
Bill of costs for taxation, including copy for the taxing officer	0	0	8	0	0	8

COPIES.

Of pleadings, briefs, and other documents where no other provision is made, at per folio	0	0	4	0	0	4
Where, pursuant to Rules of Court, any pleading, special case, or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the Court), at per folio	0	0	4	0	0	4
And for examining the proof print, at per folio ..	0	0	2	0	0	2
And for printing the amount actually and properly paid to the printer, not exceeding per folio	0	1	0	0	1	0
And in addition for every 20 beyond the first 20 copies, at per folio	0	0	1	0	0	1
And where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any altera- tion in the document being printed becomes necessary after the first proof, such further al- lowance shall be made as the taxing officer shall think reasonable.						
These allowances are to include all attendances on the printer.						
The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.						
In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (videlicet):						
Of any pleading for delivery to the opposite party, or filing in default of appearance						
Of any special case for filing						
Of any petition of right for presentation, if pre- sented in print, and for the solicitor of the Trea- sury, and service on any party						
Of any pleading, special case, or petition of right, for the use of the Court or judge						
Of any affidavit to be sworn to in print						

	Higher Scale. £ s. d.	Lower Scale. £ s. d.
And of any pleading, special case, petition of right, or evidence for the use of counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio	0 0 3	0 0 2
Such additional allowances for printed copies for the Court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause		
Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer.		
Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted	0 5 0	0 1 0
Or per folio	0 0 4	0 0 4

PERUSALS.

Of statement of claim, defence, reply, joinder of issue, and other pleading (not being a petition in a pending cause or matter, or summons other than an originating summons), by the solicitor of the party to whom the same are delivered	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of amendment of any such pleading in writing ..	0 6 8	0 6 8
Or per folio	0 0 4	0 0 4
If same reprinted	0 13 4	0 6 8
Or per folio of amendment	0 0 4	0 0 4
Of interrogatories to be answered by a party by his solicitor	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of special case by the solicitor of any party except the one by whom it is prepared	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Ord. XVI. r. 49, and of defendant's defence and counterclaim served on a person not a party under Ord. XXI. r. 13, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of claim is also to be allowed unless the solicitor has been previously allowed such perusal	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of notice to produce on trial or hearing of action, and notice to admit by the solicitor of the party served	0 13 4	0 6 8
Or if to admit facts under Ord. XXXII. r. 4, per folio	0 1 0	0 1 0

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio ..	0	0	4	0	0	4

ATTENDANCES.

To obtain consent of next friend to sue in his name or of a guardian <i>ad litem</i>	0	13	4	0	6	8
To deliver, or file in lieu of delivery, any pleading (not being a petition or summons) and a special case	0	6	8	0	3	4
To inspect, or produce for inspection, documents pursuant to a notice to admit	0	13	4	0	6	8
Or per hour	0	6	8	0	6	8
To examine and sign admissions	0	13	4	0	6	8
To inspect, or produce for inspection, documents referred to in any pleading, notice in lieu of pleading, or affidavit, pursuant to notice under Order XXXI., Rule 14	0	6	8	0	6	8
Or per hour	0	6	8	0	6	8
To obtain or give any necessary or proper consent	0	6	8	0	6	8
To obtain an appointment to examine witnesses ..	0	6	8	0	6	8
On examination of witnesses before any examiner, commissioner, officer, or other person	0	13	4	0	13	4
Or according to circumstances, not to exceed	2	2	0	2	2	0
Or if without counsel, not to exceed	3	3	0	3	3	0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit	0	6	8	0	6	8
On a summons at Judges' Chambers	0	6	8	0	6	8
Or according to circumstances not to exceed	1	1	0	1	1	0
In the Chancery Division, all allowances for attending at the Judges' Chambers are to be by the judge or chief clerk as heretofore.						
To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy	0	6	8	0	6	8
On counsel with brief or other papers—						
If counsel's fee one guinea	0	6	8	0	3	4
If more and under five guineas	0	6	8	0	6	8
If five guineas and under 20 guineas	0	13	4	0	6	8
If 20 guineas	1	1	0	0	13	4
If 40 guineas or more	2	2	0	—		
On consultation or conference with counsel	0	13	4	0	13	4
To enter or set down action, special case, or appeal, for hearing or trial	0	6	8	0	6	8
In Court on motion of course and on counsel and for order	0	13	4	0	10	0
To present petition for order of course and for order	0	13	4	0	10	0
In Court on every special motion, each day	0	13	4	0	6	8
On same when heard each day	0	13	4	0	13	4
Or according to circumstances, not to exceed	2	2	0	2	2	0
On special case, or special petition, or application adjourned from the Judges' Chambers, when in the special paper for the day, or likely to be heard	0	10	0	0	6	8

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
On same when heard	1	1	0	0	13	4
Or according to circumstances, not to exceed	2	2	0	2	2	0
On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge with or with- out a jury, or commissioner, or referee, or on assessment of damages, when in the paper	0	10	0	0	10	0
When heard or tried	1	1	0	0	13	4
Or according to circumstances not to exceed	3	3	0	3	3	0
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent	3	3	0	3	3	0
And expenses (besides actual reasonable travelling expenses) each day, including Sundays	1	1	0	1	1	0
Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case	1	11	6	1	1	0
The expenses in such case to be rateably divided.						
To hear judgment when same adjourned	0	13	4	0	6	8
Or according to circumstances	1	1	0	0	13	4
To deliver papers (when required) for the use of a judge prior to a hearing	0	6	8	0	6	8
If more than one judge	0	13	4	0	13	4
On taxation of a bill of costs	0	6	8	0	6	8
Or according to circumstances, not to exceed	2	2	0	2	2	0
Unless the same shall necessarily occupy so much time that the taxing officer shall consider such amount inadequate, in which case he may allow such further fee as he shall think proper.						
In actions and matters for purposes within the cognizance of the Court of Chancery before the Principal Act came into operation, such further fee as the taxing officer may think fit, not exceed- ing the allowances heretofore made.						
To obtain or give an undertaking to appear	0	6	8	0	6	8
To present a special petition, and for same answered	0	6	8	0	6	8
On printer to insert advertisement in Gazette	0	6	8	0	6	8
On printer to insert same in other papers, each printer	0	6	8	—		
Or every two	—			0	6	8
On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing	0	6	8	0	6	8
For an order drawn up by chief clerk, and to get same entered	0	6	8	0	6	8
On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same	0	6	8	0	6	8
To mark conveyancing counsel or taxing master ..	0	6	8	0	6	8
For preparing and drawing up an order made at chambers in proceedings to wind-up a company and attending for same, and to get same entered	0	13	4	0	13	4



INDEX.

ABATEMENT OF ACTION,

- not to abate where cause of, continues, 361.
- abated, when to be struck out, 363.
- plaintiff's solicitor to give notice of, *ib.*
- no plea or defence to be pleaded in, 404.

ABROAD,

- will proved, 130.
- will of British subject made, 190.
- practice as to administration when executors and administrators abroad, 297.
- See *Administration ; Affidavits ; Probate ; Will.*

ACCOUNT, to be rendered by administrator *pendente lite*, 434. See *Administrator pendente lite.*

ACKNOWLEDGMENT OF SIGNATURE BY TESTATOR, 71—75.

See *Testator.*

ACTION,

- commenced by writ of summons, 382.
- probate actions, what are, 352.
- See *Abatement ; Administration Action ; Contentious Business ; Costs ; Pleading ; Probate Actions ; Writ of Summons.*

ACTS OF PARLIAMENT. See *Statutes.*

“ACTUAL MILITARY SERVICE,” what is, 80. See *Soldier.*

ADMINISTRATION,

- letters of, granted to *cestui que trust*, 256.
- where trust created by will, *ib.*
- limited to specific fund devised, *ib.*
- not granted when executor appointed, 257.
- granted to party having no direct interest in estate, how limited, 258.
- to specific bequest, *ib.*
- grants to substantiate proceedings in Chancery, *ib.*
- or claim in foreign Court, *ib.*
- grants to substantiate proceedings in foreign Courts, 259.
- with testamentary appointment not mentioned in probate granted in New Zealand, refused, 260.

ADMINISTRATION—*continued.*

limited grant of, refused to legatee of married woman without citing next of kin, 260.

refused to father of married woman, husband opposing, *ib.*

limited to property in one province or in one country only, 261.

See *Administrator*; — *pendente lite*; *Affidavit*; *Alteration*, &c. of *Grants*; *Assignee*; *Bond*; *Bastard*; *Children*; *Creditor*; *Domicil*; *Felon*; *Half Blood*; *Husband*; *Infant*; *Intestates*; *Irish and Scotch Grants*; *Judicial Separation*; *Limited Grants*; *Minor*; *Oaths*; *Primogeniture*; *Protection Order*; *Queen's Proctor*; *Seaman*; *Soldier*; *Widow*.

ADMINISTRATION ACTION, what is, 352, 400, 401. See *Interest Action*; *Pleading*; *Probate Actions*.

ADMINISTRATION AD COLLIGENDUM BONA, 261—263.

when grant made, 261.

where loss likely to occur by delay, 262.

to creditor to sell goodwill of business, *ib.*

to collect debts, &c., *ib.*

to estate of foreigner, dying intestate in England, *in itinere*, granted to a responsible person, *ib.*

to a creditor, where no known relatives, 263.

to solicitor to the Treasury, *ib.*

ADMINISTRATION BONDS, 291—295, 309—315.

forms of, 291, 295.

practice as to, 309—315.

penalty to, 310, 311, 313, 314.

cannot be dispensed with, 310.

how attested, *ib.*

execution of, by sureties, *ib.*

limited or special, 311.

reduced penalty, *ib.*

who may be sureties to, *ib.*

of married woman, *ib.*

execution of, 311, 312.

more than one bond where estate increased in value, 312.

to cover property in Ireland as well as in England, *ib.*

when sureties required to justify, 313.

amount of justifying security, *ib.*

reduced justification, 314.

who may demand sureties to justify, *ib.*

sureties dispensed with, *ib.*

not dispensed with, 315.

should be in England, *ib.*

resident in Scotland, *ib.*

to justify, *ib.*

how enforced, 316—319.

new practice as to old bonds, 316.

sureties not to be substituted, 318.

assignment of bond, *ib.*

on condition, 319.

where two, given, *ib.*

when bond delivered out to be cancelled, 320.

See *Bond*.

ADMINISTRATION, *CÆTERORUM* REPRESENTATION, when taken out, 263.

ADMINISTRATION *DE BONIS NON*, 234—241.

- circumstances under which it is granted, 234.
- when necessity for, arises, *ib.*
- when rights of executor renouncing probate cease, 235.
- executor not acting treated as if he had renounced, *ib.*
- where testator dies out of jurisdiction, 236.
- further grant of, not necessary where grant made to attorney of executor, 237.
- with the will annexed to legatee, *ib.*
- value of estate to be distributed not material, *ib.*
- grant of, to specific legatee, 238.
- where husband entitled to grant of, *ib.*
- grant of, on death of administrator, with will annexed to survivor taking greatest interest under will, 239.
- limited, with will annexed, not generally granted to legatee, *ib.*
- practice of the Court respecting, on death of ordinary administrator, 239, 240.
- grant of, to assignee in bankruptcy of administrator, 241.
- to nominee of Duchy of Lancaster, *ib.*
- joint grant of, under 20 & 21 Vict. c. 77, s. 73.. *ib.*
- where administrator had committed suicide, *ib.*
- practice as to, 293—295.
- See *Executor*.

ADMINISTRATION *DURANTE ABSENTIÂ*, 248—253.

- practice of Ecclesiastical Courts as to, 248.
- under 38 Geo. 3, c. 87, s. 1, *ib.*
- under 20 & 21 Vict. c. 77, s. 74.. 248, 249.
- and 21 & 22 Vict. c. 95, s. 18.. 249.
- to assignee in bankruptcy of administrator out of jurisdiction, *ib.*
- to personal representative of legatee, 250.
- to new trustee, *ib.*
- meaning of words “at the expiration of twelve months,” in s. 1, 38 Geo. 3, c. 87, *ib.*
- grant of, where applicant residuary legatee, whose interest undetermined, 250, 251.
- distinction between ordinary and statutory jurisdiction in making grants of, 251.
- determination of grants of, *ib.*
- grant of, to person holding power of attorney to act for executor, *ib.*
- where representative wanted immediately, 251, 252.
- grant of, to attorney of Administrator-General of British Guiana, 252.
- executor cannot be passed over by reason only of bad character, unless he is out of country, 253.
- with will annexed, to paternal aunt of minor as testamentary guardian, under 20 & 21 Vict. c. 77, s. 73, *ib.*
- See *Executor*.

ADMINISTRATION *DURANTE MINORE ÆTATE*, 243—247.

- definition of, 243.
- not within 21 Hen. 8, c. 5, *ib.*
- granted to guardian, where infant under twenty-one, sole executor, *ib.*
- distinction between infant and minor, 243, 244.
- to testamentary guardian in preference to one elected by minors, 245.
- contrâ* to elected guardian of minors, *ib.*

ADMINISTRATION *DURANTE MINORE ÆTATE*—*continued*.

- under Guardianship of Infants Act, 245, 246.
- joint grant of, to widow with another guardian, 246.
- to a creditor as guardian, *ib*.
- to husband of minor wife, *ib*.
- to guardians, under 20 & 21 Vict. c. 77, s. 73.. 247.
- to paternal aunt, under above section, *ib*.
- to guardian appointed by Chancery Division, under above section, *ib*.

ADMINISTRATION *DURING LUNACY OF EXECUTOR OR ADMINISTRATOR*, 253—256.

- limited grant of, to committee of lunatic, 253.
- grant of, where no committee, to residuary legatee, or next of kin, 254.
- practice of the Court with respect to proof of lunacy, *ib*.
- where one of several joint administrators becomes lunatic, grant of, to sane one, 255.
- grant to stranger in blood, *ib*.
- one executor lunatic, the other abroad, grant to third person, *ib*.
- grants under 20 & 21 Vict. c. 77, s. 73, *ib*.
- to the clerk to the guardians of the poor, 255, 256.
- to nominee of guardians, *ib*.
- See *Executor*.

ADMINISTRATION OATHS, suggestions as to clearing off prior interests, 305—309. See *Oaths*.ADMINISTRATION *PENDENTE LITE*. See *Administrator pendente lite*.

ADMINISTRATION SAVE AND EXCEPT, 263.

ADMINISTRATION, SIMPLE, 104, 199—233.

- what it is, 104.
- when granted, 199.
- powers and duties of personal representative in, *ib*.
- not granted to infants and minors, 200.
- to *feme covert*, before and since the Married Women's Property Act, 201.
- to whom it may be granted, 202.
- order of preference, *ib*.
- husband and wife, position of, unaltered by Married Women's Property Act, 202, 203.
- to married woman who has obtained judicial separation, or dissolution of marriage, 203.
- husband's right to, where wife died intestate, held to pass to his trustee in bankruptcy, 203, 204.
- where husband and wife separated by deed, granted to wife's father, 204.
- where husband and wife domiciled in the Colonies, granted to next of kin of wife, *ib*.
- to husband convicted of bigamy, *ib*.
- to representative of widower dying without having administered to his deceased wife's effects, 205.
- where husband and wife perished by same calamity, granted to her next of kin, *ib*.
- to ante-nuptial creditor of a married woman, 205, 206.
- to attorney of infant children of married woman domiciled in Canada, 206.
- right of widow to grant of, under 21 Hen. 8, c. 5.. 206, 207.

ADMINISTRATION, SIMPLE—*continued.*

- grant of, refused to widow, 207.
- to child of lunatic widow in asylum in Colonies, 208.
- party having right to grant of, must generally be cited, 208.
- children next entitled to, after widow, *ib.*
- male children have generally prior right to, 208, 209.
- primogeniture gives no right to, 209.
- rules guiding Court in making grant where parties claiming it are equal in degree, *ib.*
- grant not made to more than three persons, 210.
- sole preferred to joint grant, *ib.*
- to "natural and lawful child," 211.
- where whole blood preferred to half blood, *ib.*
- granted to a nephew, *ib.*
- refused to nephew of intestate's next of kin, 212.
- refused to nominee of next of kin, *ib.*
- granted where will supposed to be in existence, *ib.*
- rights of the Crown to grant of, *ib.*
- grant of, where the Crown is entitled to personal estate, 212, 213.
- of effects of bastard intestate seaman, 214.
- of effects of felon, 215.
- grants under Intestates' Estates Act, 1884..215, 216.
- foreigner dying in England, 217.
- next of kin dying before grant, *ib.*
- person entitled not bound to take grant, 218.
- to attorney of next of kin, 218, 219.
- grant of, to creditor, 219—224.
 - principles on which granted, 219, 220.
 - all parties interested must be before Court, 220.
 - next of kin abroad, or no address, *ib.*
 - affidavit by creditor, *ib.*
 - creditor having obtained grant may dispute will, *ib.*
 - entitled to inventory of effects, 221.
 - creditor, what is, *ib.*
 - secretary of an association, 221, 222.
 - to guardians of poor as creditors, 222.
 - to creditor who has bought up debt, 223.
 - to mortgagee of creditor, *ib.*
 - to nominee of creditor, *ib.*
- grant of, to party without interest, 224.
 - to party interested in Chancery suit, 225.
 - to agent of person who had refused to take, *ib.*
 - to representative to bring action for damages, *ib.*
- not granted in respect to proceeds of realty under Settled Estates Act, *ib.*
- where deceased left will showing signs of insanity, grant made as if he had died intestate, 226.
- to estate of child, *ib.*
- grants of, under sect. 73 of 20 & 21 Vict. c. 77..226—230.
 - to nominees of parties interested, 227.
 - special circumstances justifying under sect. 73..228, 230.
- persons entitled in distribution, 231, 232.
- local customs relating to estates of intestates abolished, 232.
- Intestates' Estates Act, 1890..232, 233.

See *Administrator*; *Affidavit*; *Alien*; *Assignee*; *Bankruptcy*; *Bastard*; *Bond*; *Costs*; *Creditor*; *Crown*; *Distribution*; *Guardian*, &c.; *Husband*; *Irish and Scotch Grants*; *Limited Grants*; *Motions*, &c.; *Oaths*; *Primogeniture*; *Protection Order*; *Queen's Proctor*; *Statutes*; *Summonses*, &c.

ADMINISTRATION, SIMPLE, PRACTICE AS TO, 296—305.

- application for, 296.
- time for issuing letters of, *ib.*
- reason of delay, *ib.*
- identity of deceased, *ib.*
- when applied for by next of kin, *ib.*
- who are next of kin, 297.
- when executors and administrators abroad, *ib.*
- to guardians of minors and infants, 297, 298.
- affidavit filed by, 298.
- fees on, *ib.*
- oath of administrators, 298, 299.
- alteration of grant, 299.
- rule as to application for, where no known relation, *ib.*
- citation against next of kin, 300.
- in case of bastard dying within Duchy of Cornwall, *ib.*
- cessate* or *de bonis non*, *ib.*
- further security, 300, 301.
- probate rules as to administration generally, 296—300.

Forms relating to, 301—305.

1. Oath for administrators, 301.
2. Administration bond, 302, 303.
3. Fees.
4. Bill of costs, 304.
5. Oath on grant *de bonis non* to nephew, 304, 305.

ADMINISTRATION, SUPPLEMENTAL OR *CESSATE*, grants of, 263, 264.

ADMINISTRATION WITH WILL ANNEXED, 103, 104, 169—182.

- grant of, to syndics of corporation appointed executor, 106.
- when granted, 169.
- first provision for, *ib.*
- in granting, majority of interest preferred, 169, 170.
- in case of will of married woman, 170.
- residuary legatee preferred, 170, 171.
- in default of, who entitled, 171.
- grant of, to creditor or trustees, *ib.*
 - to guardian of minor universal legatee, 171, 172.
 - to trustee, 172.
 - to widow, *ib.*
 - where executor and trustee both drowned at same time, *ib.*
 - to nominee of corporation, 172, 173.
 - to attorney of personal representative appointed by court of domicile, 173.
 - to "sumners" in the Isle of Man, *ib.*
- sister of testator preferred to widow, *ib.*
 - where no clear disposition of residue, *ib.*
 - to husband as creditor of wife, 174.
 - to guardian elected by minor universal legatee, *ib.*
 - to a stranger elected by children as testamentary guardian, *ib.*
- where executrix disappeared, taking will, *ib.*
- in case of sole legatee, next of kin ordered to be cited, *ib.*
- not obligatory on Court to grant, 174, 175.
- consent of executor not alone sufficient to entitle residuary legatee, 175.
- grant to residuary legatee for life, *ib.*
 - where executors not known, *ib.*
 - names of, left blank, *ib.*

ADMINISTRATION WITH WILL ANNEXED—*continued.*

- plaintiff, residuary legatee preferred to defendant, 175.
- universal legatee, 175, 176.
- words constituting beneficiaries residuary legatees, 176, 177.
- words *not* creating residuary legatee, 178.
- when administration not granted to attorney of testator, *ib.*
- statutory provision with respect to special grants, 178, 179.
- grants of, under special circumstances under sect. 73 of 20 & 21 Vict.
c. 77..178—180.
- when not granted under sect. 73..181.
- special, *durante absentia* of executors, *ib.*
- durante minore etate*, 181, 182.
- practice as to, 289—295.
- letters of, to whom granted, 289.

Forms relating to, 289—295.

1. Will, 289.
2. Oath, 290.
3. Renunciation, *ib.*
4. Bond, 291.
5. Grant, 292.
6. Act on will, *ib.*
7. Fees, *ib.*
8. Bill of costs, 293.
9. Oath with will annexed *de bonis non*, 293, 294.
10. Ditto bond, 295.

See *Administrator*; *Affidavit*; *Alien*; *Alterations, &c.*; *Assignee*; *Attestation*; *Bankruptcy*; *Bastard*; *Bond*; *Citation*; *Codicil*; *Corporation*; *Costs*; *Executor*; *Guardian*; *Limited Grants*; *Oaths*; *Syndics*; *Trustees*; *Will*.

ADMINISTRATOR, 102, 104, 169, 199, 200, 210, 236, 238, 241, 249, 251, 252—255, 297—299, 301, 304—309.

- must be armed with authority of Probate Division, 102.
- origin of, 104.
- office of, in what particular different from that of executor, 169.
- derives his authority from the Court, 199.
- incapacities of, 200.
- when once appointed, other next of kin have no right to administration during his life, 210.
- on death of sole, administrator *de bonis non* to be appointed, 236.
- husband as, 238.
- assignee in bankruptcy of, 241, 249.
- de bonis non*, committing suicide, 241.
- durante absentia*, 251.
- General of British Guiana, grant to attorney of, 252.
- lunacy of, 253, 254, 255.
- abroad, 297.
- oath of, 298, 299, 301, 304, 305—309.

See *Administration, &c.*; *Administrator pendente lite*; *Affidavit*; *Alien*; *Assignee*; *Bankruptcy*; *Bastard*; *Bond*; *Costs*; *Creditor*; *Crown*; *Distribution*; *Guardian, &c.*; *Husband*; *Irish and Scotch Grants*; *Limited Grants*; *Motions, &c.*; *Oaths*; *Primo-geniture*; *Protection Order*; *Queen's Proctor*; *Statutes*; *Summons, &c.*

ADMINISTRATOR GENERAL OF BRITISH GUIANA, grant to attorney of, 252. See *Administration durante absentia*.

ADMINISTRATOR PENDENTE LITE, 432—438, 513, 538.

- appointment of, in the Ecclesiastical Courts, 432.
- by the Court of Probate Act, 432, 433.
- remuneration of, 433.
- security to be given by, as receiver of real estate, *ib.*
- must exhibit an inventory and render account of property, 434.
- on appointment of receiver, heir-at-law to be cited, *ib.*
- receiver to give security to extent of one year's income of property, *ib.*
- nominee of the parties usually accepted by the Court, *ib.*
- in interest suit, 434, 435.
- appointed of estate of original testator, where widow, executrix, died without having taken probate, 435.
- refused, where suit as to second codicil only, *ib.*
 - on suggestion that plaintiff, executor in two wills, was selling stock, &c., unnecessarily, *ib.*
- acting under order of Court of Chancery, not to be interfered with, 435, 436.
- appointed in all cases where receiver would be appointed in Chancery Division, 436.
- not allowed to pay annuity, except with consent of all parties, *ib.*
- appointed pending appeal to House of Lords, *ib.*
- of appointment of receiver of real estate, *ib.*
- creditor refused as, where estate insolvent, 437.
- duties of, when they begin and cease, *ib.*
- guarantee society surety to bond given by, *ib.*
- allowed to pay 50% out of estate to guarantee society to give security, *ib.*
- unable to obtain sureties to bond, Court reduced general grant to limited grant, 437, 438.
- appointed, of estate of husband, where will of deceased wife, sole executrix, in dispute, 438.
- receiver appointed as, by judge of High Court, where no *lis pendens*, *ib.*
- appointed as receiver, where executor intermeddled with assets before obtaining probate, *ib.*
- to exhibit inventory and render account of property, 513.
- costs of, 538.

See *Affidavit*.

ADMINISTRATRIX. See *Administrator*.**ADVERTISEMENT**,

- for lost will, 282.
- in newspapers, when to be filed for information of judge, 343, 344.
- when ordered to be issued in cases of presumption of death, 344, 345.

See *Presumption of Death*.

AFFIDAVITS,

- required, where no attestation clause, 68.
- on probate in common form, 103.
- required, as to words erased or obliterated, 158.
- to be sworn by applicant under 38 Geo. 3, c. 87. . 249.
- for Inland Revenue on grant of probate in common form, 266—269.
- does not require stamp, 271.
- form of, for executors, 273.
- as to duplicate will not forthcoming, 277.
- as to incorporated documents, 277, 278.
- as to words erased or obliterated, 278, 279.

AFFIDAVITS—*continued.*

- of alterations or interlineations, 279, 280.
- where subscribing witnesses dead, 280.
- not to be registered, 281.
- where will insufficiently dated, *ib.*
- by subscribing witness to show how will executed, 282.
- as to lost will, 282, 283.
- by executor for double probate, 283—285.
- for Inland Revenue, 294, 299.
- of notice to other next of kin, 296.
- by guardian to infant, 298.
- relating to alteration or revocation of grant, 324.
- for Inland Revenue Office, on increase of duty, 330.
- of service of order or decree, r. 113, C. B., 337, 338.
- in support of a motion, r. 126, C. B., 338.
- not required for grant on behalf of Duke of Cornwall, 343.
- in cases of presumption of death, *ib.*
- of minor, as to appointment of guardian, 371, 372.
- to lead citation, 413, 414.
- writ in probate action, 414.
- of service of citation, 417.
- in support of leave to cite persons interested in realty, *ib.*
- of scripts, 419.
- in answer to interrogatories, 422.
- of documents, 423.
- as to letters in custody of party to suit, 430, 431.
- on appointment of receiver, that heir-at-law, or parties interested in realty, have been cited, 434, 436.
- on entry of judgment, 456.
- admitted as evidence of execution and capacity, in absence of witness, 460.
- where witnesses unable to attend, 461.
- on motion for commission to examine witnesses, 465.
- of special circumstances for immediate examination of witnesses, *ib.*
- notice of using, at trial, 469.
- generally, 470—478.
- when evidence may be given by, 471.
- title of, *ib.*
- contents of, *ib.*
- before whom to be sworn, *ib.*
- time and place of taking, 472.
- how to be sworn and taken in Scotland, Ireland, Channel Islands, &c., *ib.*
- form of, 472, 473.
- by two or more deponents, 473.
- to be filed in proper office, *ib.*
- scandalous matter in, *ib.*
- alterations in, *ib.*
- by illiterate or blind persons, 473, 474.
- defective, 474.
- stamping of, *ib.*
- sufficiency of, *ib.*
- special times for filing, *ib.*
- in support of *ex parte* applications, 474, 475.
- use of, in non-contentious business, probate rules as to, 475, 476.
- sworn abroad, 476, 477.
- evidence taken by, 482.
- of facts giving County Court jurisdiction, 486.
- rules as to, under Order LXVI., 507—509.

AFFIDAVITS—*continued*.

of service of orders, &c., 511.

rules as to, (*App.*) 684, 685, 718.

forms used in Principal Registry, (*App.*) 693—703.

See *Administration, &c.; Citation; Costs; Evidence; Executor; Probate; Probate in Common Form.*

AFFIRMATION, in Germany, 477. See *Evidence*.

ALIENS,

power of, to acquire and dispose of real and personal property in England, 22—24.

wills of, must be in accordance with the laws of their own country, 23.

may be executors, 107.

wills of, whose domicile of origin was English, made abroad, 193.

domiciled in England, made according to law of domicile of origin, *ib.*

statute respecting, 1870..621—630.

See *Administrator; Domicil; Executor; Statute; Will.*

ALTERATION AND REVOCATION OF GRANTS, 323, 324.

by order of Court or registrar, 323.

under what circumstances, *ib.*

practice as to, 324.

fees for, *ib.*

cases as to, *in notis, ib.*

ALTERATIONS IN WILL, 95, 96, 157—167.

when operating a revocation, 95, 96.

when valid, 157.

probate rules as to, 158.

effect of ditto, 158, 159.

words inserted in different ink or handwriting do not alone constitute, 159.

presumption as to, 160.

probate of, by consent, *ib.*

trifling, in holograph will, 161.

in will of soldier on military service, *ib.*

by pencil writing traced in ink, *ib.*

name of legatee on opposite page, 161, 162.

bequest completed by indorsement before execution, 162.

attestation of alterations, *ib.*

clause appointing executors written below attestation clause, 162, 163.

definition of interlineation, 163.

single words necessary to complete sentence, *ib.*

explaining unintelligible clause, *ib.*

previous to execution of codicil, 163, 164.

interlineation omitted from probate, 164.

alteration without sufficient explanation, *ib.*

tracing over signatures, 164, 165.

alterations in pencil, 165.

when deliberative, *ib.*

erasures, 165—167.

memorandum referring to alterations, 167, 168.

alterations, how dealt with, on application for probate in common form, 278—280.

to be attested, 281.

See *Affidavit; Erasures; Execution; Interlineations; Probate; Probate in Common Form; Will.*

AMBASSADOR, certificate of as to foreign law, 478. See *Evidence*.

AMENDMENT OF PLEADINGS, 408—411.
costs of, when allowed on taxation, 527. See *Alteration of Grant*;
Appeal; *Costs*; *Pleading*.

ANNUITY, administrator *pendente lite* not allowed to pay except by consent, 436. See *Administrator Pendente Lite*.

ANTE-NUPTIAL CREDITOR OF MARRIED WOMAN, grant to, 206. See *Administration*, &c.

APPEAL, 335, 336, 450, 451, 479—489.
from registrar to judge, 335.
to Court of Appeal from chambers, 335, 336.
all applications for new trial to be made direct to Court of Appeal where case heard by a jury, 450, 451.
what orders not subject to, 479.
as to discharging orders made in chambers, *ib*.
to be by re-hearing and on motion, *ib*.
appeal to Court of Appeal from part of order, 480.
notice of, and service of, *ib*.
 amendment of, *ib*.
 time for, *ib*.
power of Court of Appeal to amend, to admit further evidence, &c., *ib*.
costs of, 481.
power of Court of Appeal to order new trial, *ib*.
appeal by respondent, *ib*.
 length of notice of, *ib*.
setting down, 481, 482.
ex parte application to Court of Appeal, 482.
questions of fact brought before Court of Appeal, *ib*.
 evidence of, *ib*.
 judge's notes of, *ib*.
when evidence to be printed for purpose of appeal, *ib*.
evidence as to direction of judge to jury, &c., 482, 483.
interlocutory order not to prejudice, 483.
time for appealing from interlocutory or final order, *ib*.
 against order made on further consideration and on summons to vary, *ib*.
security for costs of, *ib*.
stay of proceedings on, *ib*.
rules as to applications to Court of Appeal, 484.
to House of Lords, *ib*.
 form of, *ib*.
 must be within one year, 485.
 security for costs, 484, 485.
Appellate Jurisdiction Act, 1876.. 484.
to Probate Division from County Court, 487.
Probate Division cannot grant new trial in County Court except on appeal, 489.
See *Costs*; *New Trial*; *Summonses*, &c.

APPEARANCE to citations, 417. See *Citations*; *Writ of Summons*.

APPELLATE JURISDICTION ACT, 1876.. 484, 632—641. See *Statutes*.

APPLICATIONS TO EXTEND TIME, costs of ; powers of taxing officers as to, 525. See *Costs*.

APPOINTMENT OF EXECUTOR, 106—114. See *Executor*.

ASSIGNEE IN BANKRUPTCY OF ADMINISTRATOR,
when he may obtain administration *de bonis non*, 241, 249.
See *Administration de bonis non* ; *Durante absentia* ; *Grants*.

ASSIGNMENT OF ADMINISTRATION BOND, 318. See *Administration Bonds* ; *Bond*.

ASSIGNMENT OF BOND. See *Administration Bonds* ; *Bond*.

ASSIZES, TRIAL AT, 444—447, 449.

issues of fact may be tried at, 444.

registrar cannot direct, *ib*.

power of judge to order, 445.

principles guiding Court in ordering, *ib*.

order to remove new trial to, refused, *ib*.

consent of parties to try at assizes not alone sufficient, 446.

judge's power discretionary, *ib*.

when leave for, refused, *ib*.

in case of lost will, *ib*.

no power to order, without jury, *ib*.

entry of findings of fact on, 449.

See *Trial*.

ATTACHMENT,

application for, must be by motion, 342.

for non-compliance with order for discovery, 425.

solicitor not bringing script into registry, 431.

for contempt generally, 495, 496.

order must be personally served, 496.

person in custody under, to pay costs before obtaining discharge, *ib*.

persons no longer liable to, for not obeying order to pay money only,

unless when acting in fiduciary capacity, *ib*.

probate rules as to writs of, 497.

See *Enforcing Orders* ; *Motions* ; *Solicitor*.

ATTESTATION,

witness to will must sign as an act of, 69.

when insufficient, 70.

See *Affidavit* ; *Alteration in Will* ; *Attestation Clause* ; *Execution* ;
Probate ; *Probate in Common Form* ; *Testator* ; *Witness*.

ATTESTATION CLAUSE,

not necessary, 68.

no part of operative portion of codicil, 130.

imperfect, 280.

See *Affidavit* ; *Execution* ; *Probate* ; *Probate in Common Form* ;
Testator ; *Will* ; *Witness*.

ATTORNEY,

grant to, of executor, does not break chain of representation, 237.

grants to, of testator, 178.

of Administrator-General of British Guiana, 252.

of executor, *ib*.

of children of married Canadian woman, 206.

of next of kin, 218, 219.

See *Administration, &c.* ; *Administrator* ; *Costs* ; *Executor* ;
Grants ; *Limited Grants* ; *Will*.

BANKRUPT EXECUTOR, how dealt with by Chancery Division, 109.
See *Administrator*; *Executor*.

BANKRUPTCY,
of administrator, 241, 249.
of executor, 108, 109.
See *Administration, &c.*; *Administrator*; *Assignee*; *Bankrupt Executor*.

BANKRUPTCY ACT, 1883..204. See *Statutes*.

BASTARD,
right of Crown to administration, to, 212, 213.
intestate, effects of, how divided, 213.
seaman, administration of effects of, where intestate, 214.
dying within limits of Duchy of Cornwall, 215, 300.
See *Administration, &c.*; *Grants*; *Seaman*; *Solicitor to the Treasury*.

“**BEING AT SEA**,” what is, 81.

BENEFICIARY,
will made through, or obtained by, when open to suspicion, 36, 37.
will propounded by, 37.
by what words constituted residuary legatee, 176, 177.
See *Will*.

BLIND PERSONS,
will made by, 25.
rule as to probate of, 280.
See *Affidavit*; *Probate*; *Probate in Common Form*; *Will*.

BOND, 291, 295, 299—320.
forms of, in administration with will annexed, 291, 295.
no fee for filing administration bond, if the first, 299.
in administration *de bonis non*, no fee for filing, 301.
form of, 302.
to be given by every person to whom grant of administration committed, 309.
penalty to, 310.
how attested, *ib.*
execution of, by sureties, *ib.*
in limited or special grants, 311.
who may be sureties, *ib.*
of married woman, *ib.*
execution of, 311, 312.
more than one, when required, 312.
where property in Ireland, 312, 313.
sureties when required to justify, 313—315.
reduced penalty, 313, 314.
reduced justification, 314.
who may demand justification, *ib.*
sureties dispensed with, or not, 314, 315.
where administration granted to person abroad, sureties must be in England, 315.
sureties in Scotland, *ib.*
substitution of sureties, 318.
bond, how enforced, 316, 317.
assignment of bond, 318, 319.
on condition, 319.
where second bond, *ib.*

BOND—*continued*.

- delivered out to be cancelled, 320.
- guarantee society as surety to, 437.
- where sureties unobtainable, limited grant only made, 437, 438.
- administration bond, rules as to, (*App.*), 683, 715.

See *Administration Bonds*.

BOOKS, for entering caveats, 375, 376. See *Caveats*.

BRITISH GUIANA, grant to attorney of Administrator-General of, 252.

BRITISH SUBJECTS ABROAD, ETC. (WILLS OF),

- statutes relating to, 619—630.
- wills of, 190.

See *Statutes*; *Will*.

“**BURNING, TEARING, OR OTHERWISE DESTROYING**,” as revocation of will, 91—95. See *Revocation*.

CAETERORUM GRANT. See *Administration, Caeterorum, &c.*

CANCELLATION OF BOND, 320. See *Administration Bonds*; *Bond*.

CAPACITY. See *Testamentary Capacity*.

CASE ON MOTION, rules as to, 338, 339.

CAUSE. See *Action*.

CAVEATS, 374—380.

- practice as to, not altered, 374.
- probate rules as to, 374—376.
- by whom entered, 374.
- for what purpose, *ib.*
- books, 375.
- practical directions for entering, 376, 379, 380.
- receipt for, *ib.*
- directions for warning, 377.
- “warning,” what it is, *ib.*
- form of, *ib.*
- appearance to, 378.
- probate rules as to, 378, 379.
- effect of entry of, 379.

See *Citations*; *Contentious Business*; *Probate*; *Will*.

CERTIFICATES, for entry of judgment, 449. See *Trial*.

CESSATE OR SUPPLEMENTAL ADMINISTRATION. See *Administration Supplemental, &c.*

CESTUI QUE TRUST, grant of letters of administration to, 256. See *Administration*.

CHAIN OF REPRESENTATION, how executor may transmit his appointment, 118—120. See *Executor*.

CHAMBERS, appeal from, to Court of Appeal, 335, 336. See *Appeal*; *Summonses and Motions*.

CHANCERY DIVISION, grant of administration to substantiate proceedings in, 258. See *Administration*; *Bankrupt*; *Evidence*; *Executor*; *Guardian*; *Limited Grants*; *Presumption of Death*.

CHANNEL ISLANDS, affidavits, how sworn in, 472. See *Affidavits*; *Evidence*.

CHILD, grant to estate of; birth and death of, proved by declarations of deceased mother, 226.

CHILD IN *VENTRE SA MÈRE*, may be appointed executor, 107. See *Executor*.

CHILDREN,
grant to, on death of executor, 177.
means only "children" according to the law of England, and not "children" legitimized by law of parents' domicile, 211.
See *Administration with Will Annexed*, &c.; *Administrator*; *Citations*; *Limited Grant*.

CITATIONS, 411—418.

definition of, 411, 412.

must give option of obeying or showing cause, 412.

to bring in grant, *ib*.

adapted to various cases, *ib*.

origin of, to accept or refuse grant, *ib*.

probate rules as to, 413—417.

affidavit to lead, 413, 414.

to issue with writ of summons, 414.

to see proceedings, *ib*.

caveat to be entered before issue of, *ib*.

practice as to, 415—418.

service of, on infants, &c., 416.

by advertisement, *ib*.

proceedings after service of, *ib*.

where no appearance to, *ib*.

appearances to, 417.

of persons interested in realty, affidavit in support of, *ib*.

service of, by advertisement, 418.

appearance to, *ib*.

See *Administration*, &c.; *Affidavit*; *Costs*; *Draft Citation*; *Executor*; *Probate*.

CLAIM, STATEMENT OF, 399—402. See *Pleading*.

COADJUTOR, to executor, how appointed, 115, 116. See *Executor*.

CODICIL,

interpretation of, 11, 12.

revocation of will by, 83, 85—91.

not revoked by revocation of will, 98.

revival of will by, 99, 100.

executor according to the tenor of, 109, 110.

when inoperative, 126.

must be proved with will, 127.

may be proved without a will, *ib*.

tied up with will, *ib*.

referring to will not in existence, 128.

CODICIL—*continued.*

- misdescription in, 128.
- date misrecited in, *ib.*
- to revoked will, 129.
- codicils, some in England and some in India, 129, 130.
- document not expressed as a, 130.
- attestation clause no part of operative portion of, *ib.*
- to will proved abroad to be proved by Court granting probate of will, *ib.*
- erroneous reference by, to prior will, 134.
- signed by testator after witnesses had signed, not entitled to probate, 135, 136.
- incorporated with will, 138—142.
- invalid will incorporated in, 142.
- revoked and affixed to will, not incorporated, 148.
- written on deed by mistake, 150, 151.
- executed at foot of deed disposing of no property, 151.
- referring by mistake to will not in existence, 152.
- to lost will, when probate granted of, 153.
- incorporating interlineations and alterations in a will, 159.
- not confirming alterations in will, 165.

See *Administration with Will Annexed; Alterations, &c.; Execution, &c.; Executor; Incorporated Papers; Interlineations; Probate; Probate in Common Form; Revival; Revocation; Will.*

COERCION,

- undue influence must be, 43.
 - may be of various kinds, *ib.*
- See *Undue Influence.*

COLLIGENDUM BONA. See *Administration ad, &c.*

COLONIAL PROBATES ACT, 1892..673, 675. See *Statutes.*

COLONIES, affidavits, how sworn in, 472.

COMMISSARY, Scotch, finding of, conclusive as to domicil, 197.

COMMISSIONERS TO ADMINISTER OATHS, 8, 330.

COMMISSIONS AND EXAMINATIONS, 461—469. See *Affidavit; Evidence; Witness.*

COMMITTEE OF LUNATIC, 27. See *Lunacy.*

COMMON FORM BUSINESS. See *Non-Contentious Business; Practice; Probate; Probate in Common Form.*

COMMON FORM, PROBATE IN, what is, 103. See *Probate; Probate in Common Form.*

COMMORIENTES, 205, 347—349.

- husband and wife dying at same moment, 205.
 - doctrines as to, in the old Ecclesiastical Courts, 347.
 - survivorship in cases of, must depend on evidence, *ib.*
 - examples of, 348, 349.
 - persons perishing at same time by same calamity at sea, by massacre, in railway collision, &c., *ib.*
- See *Executors; Presumption of Death.*

COMPROMISE, 457—459, 549.

- jurisdiction of Court to make terms of rule of Court, 457.
- before trial, *ib.*
- agreement by executor to renounce, *ib.*
- at trial, 457, 458.
- when next of kin bound by, 458.
- judicial observations on, *ib.*
- solicitor's costs agreed on, 549.
- See *Trial at Assizes; Trial.*

CONCURRENT JURISDICTION of Probate Division with other Divisions of High Court, 8, 373.

CONCURRENT WRITS, 385. See *Writ of Summons.*

CONFIRMATION, SCOTLAND, resealing in England, 325, 326. See *Eiks; Irish and Scotch Grants; Statutes.*

CONFIRMATION, SCOTLAND, ACTS, 194—198, 610—618, 642—644.
See *Statutes.*

CONJOINT OR MUTUAL WILLS, 17. See *Will.*

CONSENT OF PARTIES, not alone sufficient to send action for trial at assizes, 446. See *Assizes, &c.*

CONTEMPT OF COURT. See *Attachment; Evidence; Solicitors.*

CONTENTIOUS BUSINESS,

- what it is, 6, 7.
- generally, 350—551.
- parties, practice as to, generally, 350—373.
- action commenced by writ of summons, 351.
- probate suit now termed probate action, *ib.*
- probate actions, what are, 352.
- parties to, 352, 353.
- “party,” “plaintiff,” “defendant,” definitions of, 353.
- plaintiffs, joint, several, and alternative claims by, 353, 354.
- substitution of other person for wrong, 354.
- defendants, joint, several, and alternative claims against, *ib.*
- defendant need not be interested in all relief claimed, 354, 355.

CONTENTS OR COPY OR DRAFT of lost will or codicil proved, 153, 154, 282, 283. See *Lost Wills; Probate; Probate in Common Form; Will.*

CONTINGENT WILL, what it is, 16. See *Will.*

CORPORATION,

- sole, may be nominated executor, 106.
- aggregate, if nominated executor, may appoint *syndics* to take administration, *ib.*
- See *Administration, &c.; Administrator; Executor.*

COSTS,

- generally, 515—551.
- persons improperly alleging undue influence or fraud, liable to be condemned in, 46.

COSTS—*continued.*

- by use of prolix forms, 382.
- pleadings, 393.
- of interrogatories, 421.
- of discovery, security for, 426, 427.
- payable by witness refusing to answer, 467.
- of appeal, 481.
- security for, of appeal, 483.
 - on appeal to House of Lords, 484.
- to be in the discretion of the Court, 515.
- where party opposing will give notice of intention only to cross-examine, 515, 516.
- of issues, to follow event, 516.
- personal liability of solicitor to pay, *ib.*
- security for, 516, 517.
 - by plaintiff temporarily within jurisdiction, 517.
 - bond as security, *ib.*
- when disallowed, or ordered to be paid by solicitor on account of delay or misconduct, *ib.*
- of solicitor guardian *ad litem*, 518.
- notice of taxing, and copy of bill, *ib.*
 - when unnecessary, *ib.*
- taxation of, by proper officer, *ib.*
 - certificate as to, *ib.*
- copy of order and statement of names of parties to be left at taxing office by party having carriage of order for taxation of, 519.
- notice of time for leaving bills to be given by taxing officer, *ib.*
- notice of adjournment of taxation, *ib.*
- powers of taxing officer when solicitor neglects to leave bill within time fixed, or impedes or delays taxation, *ib.*
- forms of bills of, 520.
- memorandum of transmission of book, paper, or document for taxation, *ib.*
- gross sum for, on interlocutory applications, *ib.*
- special allowances and general regulations as to taxations, 520—533.
 - for pleadings, &c., 520.
 - for instructions to sue, &c., 521.
 - for swearing affidavits, *ib.*
 - for drawing affidavits, &c., *ib.*
 - for delivery of pleadings, &c., *ib.*
 - perusals, *ib.*
 - for separate pleadings by same solicitor, *ib.*
 - as to evidence, *ib.*
 - as to agency and correspondence, 521, 522.
 - for attendances at chambers, 522.
 - on non-attendance or neglect of parties at chambers, *ib.*
 - folio to be seventy-two words, 523.
 - of fees to counsel for settling pleadings, affidavits, &c., *ib.*
 - of fees to counsel at chambers, *ib.*
 - as to inspection of documents, *ib.*
 - as to taking copies of documents, *ib.*
- disallowance of, where improper, vexatious, or unnecessary matter in documents or proceedings, 523, 524.
- set-off of, *ib.*
- not allowed where unnecessary appearance in Court or at Chambers, 525.
- of applications to extend time, *ib.*
- powers of taxing officers as to, 525, 526.
- taxing officer to assist when account comprises bill of costs, 526.

COSTS—*continued.*

- attendance of parties on taxation of, 526.
- refusal or neglect to procure taxation of, *ib.*
- between party and party, 527.
- of amendment of plaintiff's pleadings, *ib.*
- taxation of, where action dismissed with, *ib.*
 - where parties differ, 527, 528.
- where total of costs taxed to be stated, 528.
 - fees to conveyancing counsel, accountants, &c., *ib.*
- application of former practice relating to, *ib.*
- considerations by which taxing officer's discretion as to fees or allowances must be influenced, 528, 529.
- objections to taxation, review of, 529.
- review of taxation by taxing officer, *ib.*
 - of Taxing Master's certificate by judge, *ib.*
 - evidence on, 530.
- on taxation as between party and party, retaining fee to counsel not allowed, *ib.*
- fees or conferences, when allowed, *ib.*
- retaining two counsel, *ib.*
- refresher fees to counsel, *ib.*
- proviso as to allowance on taxation between solicitor and client, 531.
- premature delivery of briefs, *ib.*
- defendant's costs where cause called on, but not tried, *ib.*
- counsel's clerk's fees, scale of, *ib.*
- fee to counsel not allowed unless vouched by *his signature*, *ib.*
- of office copies of affidavits, 532.
- party causing delay before taxing officer, *ib.*
- when to be paid out of a fund, delivery of bill to client, *ib.*
- power of taxing officer to limit or extend time for taxation of, *ib.*
- endorsement on bill of, 533.
- probate rules as to taxing bills of, 533, 534.
- in discretion of judge, 534.
- married woman having separate estate condemned in, *ib.*
- executor propounding will in solemn form, entitled to, out of estate, *ib.*
- nude executor propounding will without cause, condemned in, 535.
- executrix losing will, *ib.*
- party destroying will, *ib.*
- heir-at-law, *ib.*
- party cited condemned in, 535, 536.
- next of kin condemned in, *ib.*
- attorney, as executor, condemned in, 536.
- next of kin unsuccessfully opposing, will not condemned in, 536, 537.
- of intervener, 537.
- executor resisting revocation of probate, condemned in, *ib.*
- pauper condemned in, *ib.*
- against infant defendant, her guardian *ad litem*, and defendant, who had appeared but not pleaded, *ib.*
- of official solicitor, guardian *ad litem*, 538.
- condemnation in, includes charges of administrator *pendente lite*, *ib.*
- of unsuccessful pleas of undue influence and fraud, *ib.*
 - of undue execution and incapacity, *ib.*
- where judge of assize would have been satisfied with verdict either way, *ib.*
- not given against widow who declined to give information as to her marriage with the deceased, 538, 539.
- not given against next of kin who opposed the will, where suspicion arose from testator's own conduct, 539.

COSTS—*continued.*

- no order as to, defendant withdrawing from suit, 539.
- attesting witnesses giving opposite evidence as to execution, *ib.*
- of executor of former will, 539, 540.
- where refused after lapse of nine years, 540.
- of Queen's Proctor, *ib.*
- no order as to part of, *ib.*
- where notice given to cross-examine only: who may give such notice under the rules—cases in illustration, 540—542.
- costs out of the estate, 542—548.
 - principle on which given, 543.
 - when litigation necessary by state in which the deceased left his papers, *ib.*
 - not given where undue influence pleaded on insufficient grounds, *ib.*
 - refused to next of kin, 543, 544.
 - given to executor or legatee acting in interest of infants, 544.
 - where reasonable ground for raising question of law or fact, *ib.*
 - where litigation caused by fault of testator, *ib.*
 - given to heir-at-law, 545.
 - in Ecclesiastical Courts, *ib.*
 - where no personal property, given out of realty, *ib.*
 - where will set aside on ground of insanity, *ib.*
 - where will established all but residuary clause, 545, 546.
 - refused, where next of kin put executors to needless expense, 546.
 - to legatee, where executors admitted portion of codicil, *ib.*
 - where question of domicile raised, as well as question of law, 546, 547.
 - omission to mention instructions for will in affidavit of scripts, no ground for giving costs out of estate, 547.
 - granted to next of kin, where will set aside on ground of incapacity, *ib.*
 - refused to defendant, where executor plaintiff condemned in, *ib.*
 - order on person as administrator to pay costs out of estate, 548.
 - where reasonable ground for disputing will, *ib.*
 - granted, where unreasonable delay in producing will, *ib.*
 - granted to a creditor, *ib.*
- of special jury, to be applied for immediately after verdict, *ib.*
- security for, 549.
 - when foreigner in England not liable to give, *ib.*
 - married woman not liable to give, *ib.*
- solicitors' lien for, *ib.*
- amount agreed, bill not liable to taxation, *ib.*
- taxation of, by registrar, as to number of counsel and witnesses, 550.
- where issues found distributively, *ib.*
- of unsuccessful party paid out of estate, how taxed, *ib.*
- where issues tried in County Court, *ib.*
- where no estate out of which to pay, *ib.*
- staying proceedings till payment of, *ib.*
- of prior action ordered to be first paid, 551.
- writ of *elegit* or sequestration to enforce payment of, *ib.*
- tables of costs in probate matters, (*App.*), 758—766, 771—775, 829—837.

COSTS OUT OF THE ESTATE, 542—548. See *Costs*.

COUNSEL,

- motions to be made by, 341.
- in pauper causes, 358, 359.

COUNSEL—*continued.*

- letters to, 428.
- speeches to jury by, 448.
- fees to conveyancing, 528.
- retaining fee to, 530.
- fees to, for conferences, *ib.*
- where two counsel, *ib.*
- refresher fees to, *ib.*
- clerks to, their fees, 531.
- vouchers for fees to, *ib.*
- fees generally, what allowed on taxation, *ib.*
- See *Costs*; *Letters*.

COUNTERCLAIM, 403. See *Pleading*.

COUNTY COURT,

- generally, 485—489.
- appeal from, 7, 487.
- jurisdiction of, in probate matters, 485.
- registrar of, to transmit certificate of decree, &c., 485, 486.
- jurisdiction of judge of, *ib.*
- affidavit of facts giving jurisdiction to, 486, 487.
- no obligation to apply for probate in any case to County Court, 487.
- Probate Division cannot regulate mode of trial in, 488.
- practice as to sending case for trial in County Court where proceedings commenced in Probate Division, 488, 489.
- as to granting new trial in, *ib.*
- Probate Rules (C. B.) binding on County Court judge, *ib.*
- costs of issues tried at, 550.
- See *Affidavits*; *Appeal*; *Costs*.

COURT OF APPEAL, order for trial without jury upheld by, 442.
See *Appeal*; *Trial*.

COURT OF PROBATE,

- creation of, 1.
- merger of, in Supreme Court, *ib.*
- constitution and jurisdiction of, 2—9.
- powers of, as court of construction, 373.
- See *Judge*; *Probate Division*.

COURT OF PROBATE ACTS, 241, 249, 429, 433, 476, 485, 488, 564, 618. See *Statutes*.

CREDITOR,

- administration granted to, 171, 219.
- grant to ante-nuptial creditor of married woman, 205, 206.
- rights of creditor, 219, 220.
- circumstances under which grant made to, 220.
- having obtained grant, may dispute will, *ib.*
- entitled to inventory of effects, 221.
- what is a, *ib.*
- grant to secretary of association as, 221, 222.
- grants to guardians of union as, 222.
- to creditor who has bought up debt, 223.
- to mortgagees and assignees in bankruptcy of, *ib.*
- to nominee of, *ib.*
- one creditor commencing proceedings, grant to another creditor, *ib.*
- claim in nature of damages, 224.

CREDITOR—*continued*.

largest claim preferred in Ecclesiastical Courts, 224.

notice to Queen's Proctor, when necessary, *ib*.

costs out of estate allowed to, 548.

See *Administration, &c.; Administrator; Bond; Citation; Costs; Limited Grant; Queen's Proctor; Will*.

CROSS-EXAMINATION,

notice to cross-examine only in probate action, 404, 515, 516.

cases, 541, 542.

See *Costs; Pleading*.

CROWN, rights of the, to grant of administration, 212, 213. See *Bastard*.

CUSTOMS AND INLAND REVENUE ACT, 1881..645—662. See *Statutes*.

DATE,

of prior will wrongly referred to in codicil, 128.

of pleadings to be marked, 409.

See *Codicil; Pleading*.

DE BONIS NON. See *Administration De Bonis Non*.

DEAF AND DUMB persons, when incapable, or capable, of making wills, 25. See *Wills*.

DEATH, PRESUMPTION OF See *Presumption of Death*.

DEBTORS ACT, 1869..491. See *Statutes*.

DECLARATION by solicitor that writ of summons issued by his authority, 386. See *Writ of Summons*.

DECLARATIONS,

of testator where admissible to show intention, 89.

as to contents of will, 154.

See *Testator*.

DEED,

executed as a will, 13, 14.

of gift, to take effect after death, admitted to probate, 131.

testamentary papers described as deeds of settlement, 141.

codicil executed at foot of, 151.

See *Codicil; Probate; Testamentary Paper; Will*.

DEFAULT IN DELIVERING PLEADINGS, 407, 408. See *Pleading*.

DEFAULT OF APPEARANCE AT TRIAL, 448. See *Trial*.

DEFENCE, STATEMENT OF, 402—407. See *Pleading*.

DEFENDANT,

plaintiff residuary legatee preferred to, 175.

definition of, 353.

See *Administration with Will Annexed; Contentious Business; Pleading*.

- DELAY in applying for grant, 267. See *Probate in Common Form*.
- DELUSIONS unfitting person to make a will, 28—32. See *Will*.
- DEMURRER, proceedings in lieu of, 406, 407.
- DEPENDENT RELATIVE REVOCATION, doctrine of, 96, 98. See *Revocation*.
- DEPOSITIONS ON COMMISSIONS AND EXAMINATIONS, 461, 469. See *Affidavits ; Evidence ; Witness*.
- DISALLOWANCE OF COSTS ON TAXATION, 524, 525. See *Costs*.
- DISCOVERY AND INSPECTION,
interrogatories, 420—422.
documents, 422—432.
See *Affidavits ; Costs ; Documents ; Interrogatories ; Letters*.
- DISPENSING WITH SURETIES to administration bond, 315. See *Bond*.
- DISSOLUTION OF MARRIAGE, position of woman who has obtained decree of, 203.
- DISTRIBUTION, persons entitled in, 231, 232. See *Administration, &c*.
- DISTRICT REGISTRIES. See *Rules for District Registries*.
- DIVISIONAL COURT, when application for new trial to be made to, 450. See *New Trial*.
- DOCUMENTS,
generally, 137—152, 422—432.
not entitled to probate, 15.
incorporation of, with will, 137—152.
discovery of, application for, 422, 423.
affidavit of, 423.
production of, *ib*.
inspection of, referred to in pleadings or affidavits, 423, 424.
notice to produce, 424.
inspection of, 424, 425.
discovery of, premature, 425.
non-compliance with order for, *ib*.
attachment of solicitor for disobedience to order for, *ib*.
service on solicitor of order for, *ib*.
security for costs of, 426, 427.
inspection of, in hands of solicitor, 427, 428.
letters to counsel and solicitor, 428.
production of, by witnesses, 428—430.
when material, may be ordered to be brought into registry, 431, 432.
See *Affidavits ; Attachment ; Discovery and Inspection ; Incorporated Documents ; Probate ; Probate in Common Form*.

DOMICIL,

- of testator, 183—198.
- grants of probate and administration, how affected by, 183.
- validity of will by law of deceased's, 183, 184.
- grant made by Court of deceased's domicile followed by Probate Division, 184, 189.
- English Court follows deceased's domicile, both as to appointment of representative and succession to personal estate, 184—190.
- estate to be administered by Court where estate situated, 184.
- duties of executor regulated by law of testator's domicile, 185.
- wills of British subjects made in or out of the United Kingdom not affected by testator's domicile at time of death, 190—192.
- the Court will regard the law of one country only at a time, 192, 193.
- domicil of origin, how affecting probate of wills made by aliens abroad or in England, *ib.*
- domiciled Englishman resident in Scotland or Ireland, and *vice versâ*, 193, 198.
- domicil of deceased, note or memorandum of, on probate, 196.
- finding of commissary conclusive as to Scotch domicile, 197.
- See *Administration*, &c.; *Execution*; *Probate*; *Testator*; *Will*.

DOUBLE PROBATE, 283. See *Probate*; *Probate in Common Form*.

DRAFT CITATION, to be settled by registrar, 418.

DRAFT OATHS, various, 305—308. See *Forms*.

DRAFT WILL, of lost will, probate of, 282. See *Lost Wills*; *Probate*; *Probate in Common Form*; *Will*.

DRUNKENNESS, a cause of incapacity to make will, 33. See *Will*.

DUCHY OF LANCASTER, grant to nominee of, 241. See *Administration De Bonis Non*; *Grants*.

DUKE OF CORNWALL, grant of administration on behalf of, not necessary to be verified by affidavit, 343. See *Affidavit*; *Bastard*.

DUPLICATE, probate in, 135, 277. See *Probate*; *Probate in Common Form*; *Will*.

DUPLICATE WILL, not forthcoming, affidavit as to, 277. See *Affidavits*.

DURANTE ABSENTIÂ. See *Administration Durante Absentiâ*.

DURANTE DEMENTIÂ. See *Administration During Lunacy*, &c.

DURANTE MINORE ÆTATE. See *Administration Durante*, &c.

DUTIES, STAMPS, &c., 272. See *Probate in Common Form*.

ECCLESIASTICAL COURTS,

- practice of, as to grants *durante absentia*, 248, 249.
- as to administration *pendente lite*, 432.

See *Administration Durante Absentiâ*; *Administrator Pendente Lite*.

EIKS, or additional confirmations, 195, 196.

ELEGIT, writ of, 492, 494, 551. See *Costs*; *Enforcing Orders*.

ENFORCING ADMINISTRATION BOND, 316, 317. See *Administration Bond*; *Bond*.

ENFORCING ORDERS, 490—497.

powers of Probate Division as to, 490.

committal orders, *ib.*

enforcing judgment for payment of money, 490, 491.

to do or abstain from any act, *ib.*

by writ of execution, &c., *ib.*

writ issued on production of judgment, *ib.*

execution, *præcipe* for writ of, 491, 492.

endorsement on writ of, 492.

date and form of writ of, *ib.*

expenses of execution, *ib.*

time to sue out execution, 492, 493.

renewal of writ of, 493.

execution to issue within six years, 494.

orders enforceable like judgments, *ib.*

order of commitment under Debtors Act, 1869, *ib.*

writs of *fi. fa.*, *elegit*, *sequestration*, rules as to, *ib.*

attachment, writ of, only by leave of Court, *ib.*

notice of motion for, to be personally served, 494, 495.

for contempt, 495.

cases on the subject of, for disobeying orders of the Court, 495, 496.

for not obeying *subpœna* to bring testamentary paper into registry, 496.

disobedience to order to pay money, *ib.*

persons acting in fiduciary capacity, *ib.*

probate rules as to attachment, 497.

other writs, *ib.*

See *Attachment*.

ENGLISH AND FOREIGN WILLS, probate of, 132. See *Probate*.

ENGLISH GRANT, re-sealing in Scotland or Ireland, 326—329. See *Irish and Scotch Grants*.

ENGROSSMENT of will in granting probate, 269—271. See *Probate in Common Form*.

ENTRY,

of caveat, effect of, 379.

for trial, 444.

of findings of fact on trial at assizes, 449.

See *Assizes*, *Trial at*; *Caveats*; *Trial*.

ERASURES IN WILL, 157—168.

probate rule as to, 158.

affidavit as to, when required, *ib.*

effect of probate rule as to, 158, 159.

words written on, burden of proof as to, *ib.*

may be restored, 159, 160.

presumption as to, 160.

probate of, by consent, *ib.*

of name of executor after execution, 162, 166.

ERASURES IN WILL—*continued*.

- after execution, original words not discernible, 165, 166.
- conflict of evidence as to, *ib*.
- declarations of testator as to, *ib*.
- obliteration of name after execution, 166, 167.
- piece of paper pasted over legacy, 167.
- name of attesting witness written on erasure, *ib*.
- how dealt with, on application for probate in common form, 279.
- See *Execution; Obliteration in Will; Probate, &c.; Probate in Common Form; Will*.

ERRONEOUS REFERENCE in codicil to prior will, 134. See *Codicil*.

ESTATE, costs out of, 542—548. See *Costs*.

EVIDENCE, 460—478.

- witnesses to be examined *vivâ voce* unless otherwise agreed or ordered, 460.
- by affidavit, where attesting witness not to be found, *ib*.
- where witness unable to attend, 461.
- refused where none of the parties cited had appeared, *ib*.
- evidence taken in other causes or matters, when to be read, *ib*.
- office copies admissible, *ib*.
- by depositions of witnesses, 461, 462.
- on commission to examine witnesses as to knowledge of testamentary paper, and generally, 462.
- on request to examine witnesses, letters of, to foreign Court, *ib*.
- Probate Division, powers of, as to commissions and examinations, &c., *ib*.
- probate rules as to, 463—465.
- motion for commission: witnesses' names to be set out in affidavit, 465.
- for examination of elderly persons, *ib*.
- special circumstances must be shown, *ib*.
- persons may be ordered by Court to attend and produce documents, &c., 466.
- disobeying order guilty of contempt, *ib*.
- expenses of, when ordered to attend, &c., *ib*.
- examiner to have copy of writ and pleadings, *ib*.
- persons to be present at examination, *ib*.
- depositions of, to be taken down in writing, &c., 466, 467.
- refusal of witness to attend to be sworn, 467.
- objections to questions, *ib*.
- costs occasioned by refusal, objection, &c., *ib*.
- depositions, to be taken to Probate Registry, 468.
- special report by examiner, *ib*.
- not to be given in evidence without consent or by leave of judge, *ib*.
- oaths, *ib*.
- attendance of witness by *subpœna* to produce documents, 468, 469.
- evidence taken after trial, 469.
- practice as to taking evidence at any stage of cause, &c., *ib*.
- special directions as to taking evidence, *ib*.
- notice to use affidavits, &c., at trial, *ib*.
- taken after trial, *ib*.
- in proceedings subsequent to trial, *ib*.
- subpœna, præcipe* for a, 469, 470.
- form of, 470

EVIDENCE—*continued.*

- subpœna* for attendance of witness in Chambers, 470.
 - number of persons in a, *ib.*
 - correction of errors in, *ib.*
 - service of, *ib.*
 - affidavit to prove, *ib.*
 - within what time must be served, 471.
- affidavits, 471—477.
 - title of, 471.
 - contents of, *ib.*
 - before whom to be sworn, *ib.*
 - time and place of taking, 472.
 - how to be sworn and taken in Scotland, Ireland, the Channel Islands, colonies, and foreign parts, *ib.*
 - form of, *ib.*
 - to state description and abode of deponent, 473.
 - made by two or more deponents, *ib.*
 - to be filed in proper office, *ib.*
 - scandalous matter in, *ib.*
 - alterations in, *ib.*
 - by illiterate or blind persons, 473, 474.
 - use of defective, 474.
 - stamping, and office copies of, *ib.*
 - sworn before solicitor or agent, *ib.*
 - clerk or partner of solicitor, *ib.*
 - special times for filing, *ib.*
 - in support of *ex parte* applications, 474, 475.
 - Probate Rules as to, 475, 476.
 - sworn abroad, 476, 477.
- affirmation in Germany, 477.
- party propounding will must call at least one attesting witness, *ib.*
- forgery proved in Chancery Division not allowed to be denied in action in Probate Division, *ib.*
- foreign law must be proved by expert, 478.
- certificate of foreign ambassador, or affidavit of secretary of legation as to foreign law, *ib.*
 - See *Affidavits; Costs; Trial; Will; Witnesses.*

EXAMINATIONS AND COMMISSIONS, 461—469. See *Affidavits; Evidence; Witness.*

EXECUTION OF ADMINISTRATION BOND, by sureties, 310.

See *Administration Bond; Bond.*

EXECUTION OF WILL, 59—82.

- before and since passing of Wills Act, 59.
- signature of testator, position of, 59—67.
 - by mark, 61, 62.
 - acknowledgment of, by testator, 71—75.
- signatures of testator and witnesses on separate paper, tied to will, 62.
- two papers, one signed by testator, other by attesting witnesses, *ib.*
- signature of testator by some other person at his request, 62, 63.
- testator must write his own name, or vicariously, 63.
 - must sign before attesting witnesses, 63, 67, 69.
- “foot or end,” explained, 63, 64.
 - cases on position of testator’s signature, 64—66.

EXECUTION OF WILL—*continued*.

- attesting witnesses, position of signatures of, 66.
must sign or make mark, 68.
 - witness must sign as an act of attestation, 68, 69.
 - witnesses must be present at same time, 70.
cannot direct third person to sign for them, *ib*.
must sign as witnesses and not in some other character,
71.
must see testator writing his signature on will, *ib*.
must be aware that paper is testamentary, 73.
mutual presence of, and testator, 75, 76.
 - presumption as to due, *omnia rite esse acta*, 76—78.
 - will written on several sheets, 78.
 - by soldiers and mariners, 79—82.
- See *Affidavits*; *Codicil*; *Costs*; *Testator*; *Will*; *Witness*.

EXECUTION, WRITS OF, 492—494. See *Enforcing Orders*.

EXECUTOR ACCORDING TO THE TENOR, 109, 113, 116. See *Executor*.

EXECUTOR *DE SON TORT*, 120. See *Executor*.

EXECUTORS,

- of the appointment of, 106—123.
- who may be, 106—108.
- Married Women's Property Act, 1882, application of, to office of
executor, 107, 108.
- attainted person, or bankrupt executor, how dealt with in the
Chancery Division, 108, 109.
- injunction granted against executor improperly intermeddling, 108.
- idiots and lunatics incapable of being, 109.
- are either nominate, or according to the tenor, 109, 113, 116.
- appointment of, can be by will only, 109.
may be absolute or qualified, 109, 116.
must be certain, 109.
- void for uncertainty, 113.
limited, *ib*.
- what words in testamentary documents have been
held to amount to an appointment of executors,
110—114.
revocation of appointment by implication, 114.
- ambiguity, removed by parol evidence, *ib*.
- name of executor written on erasure, 115.
- incorrectly described, *ib*.
- parol evidence not admitted to explain ambiguity, *ib*.
- coadjutor to, how appointed, *ib*.
distinction between coadjutors and executors, 115, 116.
- executor according to tenor proving with executor nominated, 116.
- distinction between substituted and instituted executors, *ib*.
- contingent appointment of executor, 117.
- delegated appointment of, *ib*.
- appointment of, how qualified, *ib*.
- limited appointment of, 117, 118.
- conditional appointment of, 118.
- how an executor may transmit his appointment, 118—120.
- chain of executorship, when broken in law, 119, 120.
- de son tort*, 120.

EXECUTORS—*continued*.

- executor cannot be compelled to accept office, 120.
- but may be cited to take or refuse probate, 120, 121.
- renunciation by executor, 121—123.
- intermeddling by executor, what is, 121—123, 495.
 - effect of, 123, 495.
- executor, signature of, omitted from probate, 151.
 - and legatee drowned at same time, 172.
 - disappearing with will, 174.
 - not known, 175.
 - name of intended, in blank, *ib*.
 - estate of number of, a joint estate, 234.
 - renouncing probate, rights of, to cease, 235.
 - where, dies without taking probate, 235, 236.
 - not acting, or not appearing to citation, 235.
 - distinction between office of, and that of administrator, 236.
 - grant to attorney of, 237.
- where infant is sole executor, 243.
- executor of an executor, 250.
- power of administrator *durante absentia* determines on return of executor, 251.
- person holding power of attorney to act for executor in England, *ib*.
- lunacy of executor, 253.
- oath of executor, 266.
 - form of, 273, 326.
- when necessary to prove identity of executor in granting probate, 268.
- how executor may be sworn, 283.
- form of renunciation by, 290.
- abroad, may take grant, 297.
- oath for, on resealing grants, form of, 326.
- right of next of kin to put executor to proof of will in solemn form, 364.
- executor who has proved will, cannot dispute its validity, 371.
- when entitled to costs out of estate, 544.
- condemned in costs, 547.

See *Administration Durante Absentia*; *Administration Durante Minore Aetate*; *Administration during Lunacy*; *Administration De Bonis Non*; *Administrator pendente lite*; *Affidavits*; *Attorney*; *Bankrupt*; *Child, &c.*; *Codicil*; *Costs*; *Husband*; *Infant*; *Married Woman*; *Oaths*; *Pleading*; *Probate*; *Probate in Common Form*; *Will*.

EXECUTRIX,

- disappeared, taking will with her, 174.
- widow dying without taking probate, appointment of administrator *pendente lite* to estate of original testator, 435.
- See *Administration pendente lite*; *Administration with Will, &c.*; *Executor*.

FAC SIMILE, PROBATE IN, 168. See *Obliterations in Will*; *Pencil Writing*; *Probate*; *Probate in Common Form*.

FACT, questions of, before Court of Appeal, 482. See *Appeal*.

FATHER, of married woman, grant to refused, husband opposing, 260.
See *Administration*.

FEAR, will made under influence of, 35. See *Will*.

FEES,

in non-contentious business, (*App.*) 744—757.

in Court and contentious business, (*App.*) 767—775.

See *Administration, Simple*; *Probate in Common Form*.

FELON,

no longer incapacitated from making will, 58.

administration of effects of, 215.

See *Administration, &c.*; *Will*.

FEME SOLE,

woman having obtained decree of dissolution of marriage considered as, 203.

protection order, 53.

FORCE, will obtained by actual, 35. See *Will*.

FOREIGN AMBASSADOR OR SECRETARY OF LEGATION, certificate or affidavit of, as to foreign law, 478. See *Evidence*.

FOREIGN COUNTRY, affidavits, how sworn in, 472. See *Affidavits*; *Evidence*.

FOREIGN COURT, grant to substantiate claim in, 258, 259. See *Administration*.

FOREIGN LAW, evidence of, by expert, 478. See *Evidence*.

FOREIGNER, dying in England, statute relating to, 217. See *Administration, &c.*; *Alien*; *Statutes*.

FORMS ^(a),

Administration bonds, 291, 295, 302.

Administration with will annexed, 289.

Caveat, 380.

Grants of administration, 301.

Oath of administrator, 301, 304, 305.

Oaths of executors, 273, 285, 289, 290.

Of administrator, *caterorum* grant, 288.

Of administrator *de bonis non*, 293.

Of administrator with will annexed, 290.

Of engrossment of will for probate, 274.

Of probate, *ib.*

Of fees on probate, 275, 286, 303.

Of receipts for probate, 275.

Of receipts for caveat, 380.

Of memorial to Commissioners of Inland Revenue on new grant, 284, 285.

Of bills of costs, 276, 287, 293, 304, 520.

Of oath for double probate, 285.

Of oath on resealing an English grant in Scotland, 326.

Simple administration, 303.

Of various kinds used in the Principal Registry, (*App.*) 693—705.

Under the Judicature Acts, (*App.*) 781—828.

(a) The forms set out here occur in the body of the text. Forms to meet every necessity will be found in Appendix, 693—705, 781—828.

FORMS OF DRAFTS OF VARIOUS OATHS FOR ADMINIS-
TRATORS, 306—308.

1. Lawful husband, 306.
2. Lawful widow and relict, *ib.*
3. Father, *ib.*
4. Mother, *ib.*
5. Child, *ib.*
6. Brother or sister, brother or sister half-blood, *ib.*
7. Grandson, 307.
8. Ditto, and person entitled in distribution, *ib.*
9. Grandfather or grandmother, *ib.*
10. Lawful nephew or niece, *ib.*
11. Ditto ditto, and person entitled in distribution, *ib.*
12. Uncle or aunt, 308.
13. Cousin German, *ib.*
14. Ditto, once removed, *ib.*
15. Second cousin or first cousin twice removed, *ib.*
16. First cousin thrice removed, or second cousin once removed, *ib.*
17. First cousin four times removed, or second cousin twice removed, or third cousins, *ib.*
18. First cousin five times removed, second cousin three times removed, or third cousin once removed, *ib.*

FORMS OF PLEADING,

in an action for revocation of probate, 776, 777.

in an action setting up a lost will, 778—780.

under Judicature Acts (*App. C., D.*), 792—794.

FORMS OF WRIT OF SUMMONS, 781—783.

FORMS OF INDORSEMENTS ON WRIT OF SUMMONS, 785, 786.

FRAUD,

will obtained by, void, 36.

must be specially pleaded, *ib.*

plea of, allowed to be added after defendant's cross-examination, 37.

See *Contentious Business*; *Costs*; *Evidence*; *Pleading*; *Will*.

FRAUDS, STATUTE OF, 79, 80, 202. See *Statutes*.GERMANY, affirmation in, 478. See *Evidence*.

GRANTS,

on the various grants issued by the Probate Division, 102—105.

Some examples of—

Of administration durante minore ætate,

to guardian, where infant under twenty-one, sole executor, 243.

to testamentary guardian in preference to one elected by minors, 245.

to elected guardian of minors, *ib.*

under Guardianship of Infants Act, 245, 246.

joint grant of, to widow with another guardian, 246.

to a creditor as guardian, *ib.*

to husband of minor wife, *ib.*

to guardians, under 20 & 21 Vict. c. 77, s. 73..247.

to paternal aunt, under above section, *ib.*

to guardian appointed by Chancery Division, under above section, *ib.*

GRANTS—*continued.*Some examples of—*continued.*

Of administration during lunacy of executor or administrator,

limited grant of, to committee of lunatic, 253, 254.

grant of, where no committee, to residuary legatee, or next of kin, 254.

where one of several joint administrators becomes lunatic, grant of, to sane ones, 255.

to third person, *ib.*

to stranger in blood, *ib.*

grants under 20 & 21 Vict. c. 77, s. 73. *ib.*

to the clerk to the guardians of the poor, 255, 256.

to nominee of guardians, 256.

Of simple administration,

to husband convicted of bigamy, 204.

to representative of widower dying without having administered to his deceased wife's effects, 205.

where husband and wife perished by same calamity, granted to her next of kin, *ib.*

to ante-nuptial creditor of a married woman, 205, 206.

to attorney of infant children of married woman domiciled in Canada, 206.

to child of lunatic widow in asylum in Colonies, 208.

to "natural and lawful child," 211.

to a nephew, *ib.*

to attorney of next of kin, 218, 219.

to creditor, 219—224.

to guardians of union as creditors, 222.

to creditor who has bought up debt, 223.

to mortgagee of creditor, *ib.*

to nominee of creditor, *ib.*

to party without interest, 224.

to nominees of parties interested, 227.

under special circumstances, under sect. 73 of 20 & 21 Vict. c. 77.. 228—231.

to *cestui que trust*, 256.

where trust created by will, *ib.*

to substantiate proceedings in other Courts, 259.

limited to property in one country only, 260, 261.

Of administration ad colligendum bona.

where loss likely to occur by delay, 262.

to creditor to sell goodwill of business, *ib.*

to collect debts, &c., *ib.*

of foreigner, dying intestate in England, *in itinere*, granted to a responsible person, *ib.*

to a creditor, 263.

to solicitor to the Treasury, *ib.*

Of administration de bonis non,

to assignee in bankruptcy of administrator, 241.

to nominee of Duchy of Lancaster, *ib.*

joint grant of, under 20 & 21 Vict. c. 77, s. 73. *ib.*

where administrator had committed suicide, *ib.*

Of administration durante absentia,

to assignee in bankruptcy of administrator, 249.

to personal representative of legatee, 250.

to new trustee, *ib.*

to applicant residuary legatee, whose interest undetermined, 250, 251.

to person holding power of attorney to act for executor, 251.

GRANTS—*continued.*Some examples of—*continued.**Of administration durante absentia*—*continued.*

- where representative wanted immediately, 252.
- to attorney of Administrator-General of British Guiana, *ib.*

Of administration with will annexed,

- to creditor or trustees, 171.
- to guardian of minor universal legatee, 172.
- to trustee, *ib.*
- to widow, *ib.*
- to nominee of corporation, 172, 173.
- to "summers" in the Isle of Man, 173.
- sister of testator preferred to widow, *ib.*
 - to husband as creditor of wife, 174.
 - to guardian elected by minor universal legatee, *ib.*
 - to a stranger elected by children as testamentary guardian, *ib.*
- where executrix disappeared, taking will, *ib.*
- to residuary legatee for life, 175.
- where executors not known, *ib.*
- plaintiff residuary legatee preferred to defendant, *ib.*
- to universal legatee in trust only, 175, 176.

Of probate,

- of inoperative codicil, 126.
- of codicil without will, 127.
- of codicils tied up with will, *ib.*
- of will and several codicils, 128.
- of codicil referring to will not in existence, *ib.*
- of codicil to revoked will, 129.
- of codicil not so expressed, 130.
- of codicil, where no attestation clause, *ib.*
- of will proved abroad, *ib.*
- of will contained in several papers, 130, 131.
- of testamentary papers described as deeds of gift, 131.
- of will imperfectly copied, *ib.*
- of two wills leaving property in different places, 132.
- of English and foreign wills, *ib.*
- of inconsistent testamentary papers, 133.
- where erroneous reference by codicil to prior will, 134.
- of two wills of different purport, *ib.*
- of only one of two testamentary papers, 135, 136.
- of more or less than actual testamentary paper, 137.
- of documents referred to in duly-executed testamentary instrument, 138.
- of documents held to be incorporated with will, 138—142.
- of less than whole document, 150.
- of codicil written on deed by mistake, *ib.*
- of codicil executed at foot of deed not disposing of property after death, 151.
- of codicil to lost will, 153.
- of lost wills, 153—156.

See *Administration*; — *ad colligendum bona*; — *cæterorum*; — *de bonis non*; — *durante absentia*; — *durante minore ætate*; — *during lunacy of executor or administrator*; — *simple*; — *supplemental or cessate*; — *save and except*; — *with will annexed*; *Administrator pendente lite*; *Alteration and Revocation of Grants*; *Creditors*; *Eihs*; *Guardians*; *Husband*; *Irish and Scotch Grants*; *Limited Grants*; *Minor, &c.*; *Probate*; — *in Common Form*; *Queen's Proctor*; *Seaman*; *Soldier*; *Trustees*; *Widow.*

GRANTS, ALTERATION AND REVOCATION OF, 323, 324.

GRANTS, PAYMENTS WITHOUT, 320—322.

- of pay, half-pay, pension, or allowance, 320.
- by Board of Trade of effects of merchant seamen, under 50*l.*, *ib.*
- deposits by seamen in savings bank, *ib.*
- of soldiers' pension, prize money, or pay up to 100*l.*, 321.
- of deposit in savings bank not exceeding 50*l.*, 321, 322.
- by loan or friendly society, 322.
- by the Treasury, *re* officers in the civil service, *ib.*

GUARANTEE SOCIETY, surety to bond given by administrator *pendente lite*, 437. See *Administrator pendente lite*.

GUARDIAN,

- generally, 243—247.
 - administration granted to, where infant under twenty-one sole executor, 243.
 - assigned by the Court, *ex officio*, to an infant, 244.
 - father has first right to be, of his infant children, *ib.*
 - when passed over by the Court, *ib.*
 - minor, sole next of kin and residuary legatee, may select a, *ib.*
 - elected by minor, preferred to the father where wife had obtained a divorce, *ib.*
 - where wife had obtained a protection order, *ib.*
 - but not in case of separation by consent, 245.
 - testamentary, preferred to guardian elected by minors, *ib.*
 - provisions respecting, under 49 & 50 Vict. c. 27.. 245, 246.
 - joint grant to widow as, of her own children, and guardian of children of deceased by former marriage, 246.
 - creditor appointed as, to minors, *ib.*
 - wife, minor, may elect her husband as, *ib.*
 - of minors, grants to, under 20 & 21 Vict. c. 77, s. 73.. 247, 253.
 - grant to paternal aunt as, of minor sole legatee, 247.
 - appointed by Chancery Division, *ib.*
- See *Administration*, &c.; *Administrator*; *Affidavit*; *Citation*; *Costs*; *Executor*; *Limited Grant*.

GUARDIAN AD LITEM,

- costs of solicitor of, 518.
 - official solicitor appointed, costs of, 538.
- See *Costs*.

GUARDIANS OF POOR, grant to, as creditors, 222. See *Administration*, &c.; *Creditor*.

GUARDIANSHIP OF INFANTS ACT, 1886.. 245. See *Statutes*.

HABEAS CORPUS, to bring up party to attend trial, 448.

HALF BLOOD, whole blood preferred to, in grant of administration, 211. See *Distribution*.

HEIR-AT-LAW,

- citation of, 124, 368, 434.
 - costs of, 545.
- See *Administrator pendente lite*; *Administration with Will annexed*; *Affidavit*.

HEIRLOOMS,

definition of, 126.

not within jurisdiction of Probate Court, *ib.*

See *Probate*.

HOLOGRAPH WILL, trifling alteration in, 161. See *Alterations in Will*.

HOUSE OF LORDS, administration *pendente lite* pending appeal to, 436. See *Administrator pendente lite*; *Appeal*.

HUSBAND,

generally, 202—205.

right of, to grant of administration, 202.

and wife, right of survivor to administration, 202, 203.

passed over, 203.

covenanting not to claim property in case of wife's intestacy, 204.

and wife domiciled in colonies, *ib.*

convicted of bigamy, *ib.*

rights of husband's representative, 205.

husband dying without administering estate of wife, *ib.*

and wife perishing by same calamity "*commorientes*," *ib.*

See *Administration, &c.*; *Administrator*; *Costs*; *Executor*; *Grants*; *Oaths*; *Presumption of Death*; *Probate*.

IDENTITY OF DECEASED, how shown in granting letters of administration, 296. See *Administration, &c.*

IDIOT,

incapable of making will, 24.

or of being an executor, 109.

See *Administrator*; *Executor*; *Insanity*; *Lunacy*; *Sanity*; *Will*.

ILLITERATE, wills made by, 25. See *Affidavit*; *Persons who cannot Read*; *Probate in Common Form*; *Will*.

IMPORTUNITY, will obtained by, 38. See *Pleading*; *Will*.

INCAPACITY,

to make a will, 24.

who are incapable of acting as executors, 109.

administrators, 200.

particulars not necessary, where alleged, 395.

See *Administrators*; *Executors*; *Pleading*; *Will*.

INCONSISTENT TESTAMENTARY PAPERS, 133. See *Probate*; *Will*.

INCONSISTENT WILL,

how dealt with, 90.

when operates to revoke earlier will, *ib.*

See *Probate*; *Revocation*.

INCORPORATED PAPERS, 137—150.

documents sometimes incorporated with will, so as to be entitled to probate, 137.

Probate Rules as to, 137, 138.

reference to, in testamentary paper, 138.

INCORPORATED PAPERS—*continued*.

cases in which documents have been held to be incorporated by the terms of a testamentary paper, 138—142.

cases in which documents have been held not to be so incorporated, 143—149.

result of decisions on, 149, 150.

rules as to, 277, 278.

See *Codicil*; *Documents*; *Probate*; *Probate in Common Form*; *Will*.

INCORPORATION OF DOCUMENTS, &c., 137—150. See *Codicil*; *Documents*; *Incorporated Papers*.

INDORSEMENTS,

on writ of summons, 383.

forms of, 785, 786.

See *Writ of Summons*.

INFANT,

will made by, not valid, 24.

may be appointed executor, 107.

cannot be an administrator, 200.

sole executor, administration granted to guardian, 243.

distinction between, and minor, 243, 244.

guardianship of, 244—246.

See *Administration, &c.*; *Administrator*; *Citations*; *Costs*; *Executor*; *Guardian*; *Limited Grants*; *Minor*; *Will*.

INFLUENCE OF FEAR, will made under, 35. See *Fear*; *Undue Influence*; *Will*.

INJUNCTION granted against executor, 108. See *Executor*.

INLAND REVENUE,

Customs and, Act, 1881. .645—652.

affidavit for, 266, 294, 299, 330.

See *Affidavits*; *Probate in Common Form*; *Statutes*.

INOPERATIVE CODICIL, 126. See *Codicil*.

INSANITY,

evidence of, 26.

partial, defined, 28.

"intoxication is, in truth, temporary," 33.

deceased leaving will marked with, 226.

See *Lunacy*; *Will*.

INTENTION TO REVIVE OR REVOKE WILL, must be evidence of, on face of later will, to operate as revival or revocation, 88, 89, 100. See *Revival*; *Revocation*.

INTEREST, majority of, preferred in granting administration with will annexed, 170. See *Administration with Will annexed*.

INTEREST SUIT OR ACTION,

meaning of, 352, 400, 401.

administrator *pendente lite* in, 434.

See *Action*; *Contentious Business*; *Pleading*; *Probate Action*.

INTERLINEATIONS IN WILL,

- generally, 157—164.
- when valid, 157—159.
- Probate Rules relating to, 158.
- words inserted in different ink or handwriting do not alone constitute an, 159.
- definition of, 163.
- consisting of single words necessary to complete sentence, *ib.*
- clause made intelligible by, *ib.*
- omitted from probate, 164.
- how dealt with, on application for probate in common form, 279.
- See *Affidavit*; *Alterations*; *Codicil*; *Erasures*; *Obliterations*; *Probate*; *Probate in Common Form*; *Will*.

INTERMEDDLING BY EXECUTOR, 121, 122, 495. See *Executor*.

INTERROGATORIES,

- generally, 420—428.
- rules as to, 420—422.
- as to sums of money received from testator, 421.
- matters to be considered on application for, *ib.*
- costs of, *ib.*
- form of, *ib.*
- in cases of corporations or companies, 421, 422.
- objections to, by answer, 422.
- setting aside and striking out, *ib.*
- affidavit in answer, *ib.*
 - printing, *ib.*
 - no exception to be taken to, *ib.*
- order to answer, or answer further, *ib.*
- using answers to, at trial, 425, 426.
- security for costs of, 426, 427.
- witnesses to be examined on, order for attendance of, 428.
- See *Affidavit*; *Costs*; *Documents*.

INTERVENER,

- what is an, 365.
- defendant condemned in costs of, *ib.*
- pleading by, 366.
- rules as to, 369.
- See *Costs*; *Pleading*.

INTESTACY. See *Administration, &c.*; *Administrator*; *Bastard*; *Distribution*; *Intestates*; *Limited Grants*; *Oaths*.INTESTATES, widows and children of, where personal estate of small value, 630, 631. See *Statutes*.INTESTATES' ESTATES ACTS, 1873, 1884, 1890..630, 215, 216, 232, 233, 672. See *Statutes*.INTOXICATION, will made under influence of, 33. See *Insanity*; *Will*.INVENTORY to be exhibited by administrator *pendente lite*, 434. See *Administrator pendente lite*.

IRELAND,

- statutes relating to probate in, 194—198.
- affidavits how sworn in, 472.
- See *Affidavits*; *Evidence*.

IRISH AND SCOTCH GRANTS,

seal of the Court to, 197.

practice as to resealing English grants of probate and administration in Scotland and Ireland, 325—329.

See *Administration Bonds*; *Bond*.

ISLE OF MAN, “summers” in the, duties of, 173. See *Affidavits*; *Evidence*.

ISSUES of fact may be tried at assizes, 444. See *Assizes*, &c.; *Costs*.

JOINT GRANTS,

of administration *de bonis non*, under sect. 73 of 20 & 21 Vict. c. 77.. 241.

to widow and another guardian *durante minore ætate*, 246.

not made to more than three persons, 210.

sole preferred to joint grant, *ib*.

joint grants refused, 210, 211.

See *Administration*, &c.; *Executor*; *Probate*; *Limited Grants*.

JUDGE,

of Probate Court appointed judge of High Court, 2.

to be president of Probate Division, 3.

powers of, 4.

as president of division, 8.

who may be appointed as, 7.

special jury by order of, 442.

trial before single, *ib*.

power of, to order trial at assizes, 445, 446.

not to sit on motion for new trial in cause tried before himself, 451.

notes by, production of, 482.

of County Court, jurisdiction, &c. of, 486.

advertisements, when to be filed for information of, 343.

trial by, with or without jury, 441—443.

copies of pleadings for use of, at trial, 447.

See *Appeal*; *Assizes*; *Trial*.

JUDGMENT,

where one party does not appear at trial, 448.

motion for, 453—455.

entry of, 455, 456.

by consent, 456.

See *Trial*.

JUDICATURE ACTS,

1873..1, 2, 3, 4, 5, 8, 381, 438, 479.

1875..7, 332, 350.

1890..450, 454.

See *Statutes*.

JUDICIAL SEPARATION,

woman who has obtained, may dispose of her property as *feme sole*, 53.

and may act as administratrix, 201, 203.

See *Married Woman*.

JURISDICTION OF PROBATE DIVISION, 1—8. See *Administration, &c.*; *Alteration, &c. of Grants*; *Appeal*; *Assizes, &c.*; *Attachment*; *Compromise*; *Concurrent Jurisdiction*; *Costs*; *Court of Probate*; *Discovery and Inspection*; *Domicil*; *Enforcing Orders*; *Executor*; *Guardian*; *Heirlooms*; *Judge*; *New Trial*; *Presumption of Death*; *Probate*; *Solicitors*; *Trial*; *Witness*.

JURY,

no power to order trial at assizes without, 446.

trial of probate action by, 441, 448, 449.

See *Assizes*; *Special Jury*; *Trial*.

JUSTIFYING SECURITY, 313, 314. See *Administration Bond*; *Bonds*.

KING OR QUEEN,

power of to make will, 24.

jurisdiction of Court to grant probate of will of, *ib.*

may be executor, 106.

KNOWLEDGE AND APPROVAL of contents of will by testator, 18—21. See *Testator*; *Will*.

LANGUAGE OF WILL, 12, 13. See *Will*.

“**LAST WILL**,” these words do not necessarily revoke previous will, 87, 88. See *Revocation*.

LEGAL CONDITION OF ALIENS AND BRITISH SUBJECTS, 621—630. See *Statutes*.

“**LEGAL HEIRS, AND THEIRS FOR EVER**,” bequest to my, &c., by uneducated person, held to pass the personalty to the heir-at-law, and not next of kin, 176, 177.

LEGATEE,

grants to, 237, 238.

of married woman, grant to, refused without citing husband, 260.

See *Administration, &c.*; *Administrator*; *Grants*; *Residuary Legatee*.

LEGITIMACY,

where real question in dispute, Court refused to strike out defence on motion only, 343.

LETTERS,

to counsel and solicitor, order for production of, 428.

of deceased, discovery and inspection of, 430.

LETTERS OF ADMINISTRATION. See *Administration with the Will Annexed*.

LIBELLOUS AND OFFENSIVE PASSAGES in will omitted from probate, 152, 153. See *Probate*.

LIMITED GRANTS, 242—264.

what they are, 242.

Probate Rules as to, *ib.*

LIMITED GRANTS—*continued.*

durante minore ætate, 243—247.

durante absentia, 247—253.

during lunacy of executor or administrator, 253—256.

until there be an executor, 257.

till will be found, *ib.*

limited to a particular subject, *ib.*

to a particular fund, 257, 258.

to specific bequest, *ib.*

to substantiate proceedings in Chancery, and in other Courts, 258, 260.

of administration to property in one province or in one country only, where property left in two provinces, or in different countries, 260, 261.

ad colligendum bona, 261—263.

cæterorum, 263.

save and except, *ib.*

supplemental or cessate, 263, 264.

See *Administration*; — *ad coll. bona*; — *Cæterorum*; — *De Bonis Non*; — *Durante Absentia*; — *Durante Minore Ætate*; — *During Lunacy*, &c.; — *Save and Except*; — *Simple*; — *Supplemental or Cessate*; — *with Will annexed*; *Administrator Pendente Lite*; *Creditor*; *Executor*; *Guardian*; *Probate*; — *in Common Form*; *Trustees*; *Widow*.

LOCKE KING'S ACT (15 Vict. c. 24), 60, 63, 562—564. See *Statutes*.

LOST WILLS,

presumption as to revocation of, 98, 99.

when probate granted of draft or contents of, 153.

probate of, on motion, *ib.*

of codicil to, *ib.*

contents of, how proved, 153, 154.

cases on, *in notis*, *ib.*

probate of, granted after several years, 155.

affidavit by executor applying for probate of, 282.

advertising for, *ib.*

draft or copy of, probate of, 282, 283.

refusal to send issue as to, for trial at assizes, 446.

example of set of pleadings in action setting up, 778—780.

See *Probate*; *Probate in Common Form*; *Revocation*; *Will*.

LUCID INTERVAL, will made by lunatic during, 27. See *Will*.

LUNACY,

commission of, 26, 27.

of executor or administrator, 253—255.

examples of grants during, 255, 256.

See *Administration during Lunacy*, &c.; *Citations*; *Executor*; *Guardian*; *Idiot*; *Insanity*; *Limited Grants*; *Monomania*; *Sanity*; *Widow*.

LUNATIC,

definition of, 25, 26.

will made by, in lucid interval, 27.

incapable of being an executor, 109.

lunatic widow, not cited on grant of administration, 208.

See *Lunacy*.

MAJORITY OF INTEREST preferred in granting administration with will annexed, 170. See *Administration with Will Annexed*.

MARINE. See *Minor*; *Seaman*; *Soldier*.

MARINER. See *Purser*; *Seaman*.

MARKING WILLS AND CODICILS annexed to oath of executor, 268. See *Probate in Common Form*; *Will*.

MARKS on will, sealing-wax, &c., 278. See *Probate in Common Form*.

MARRIAGE,
 revokes will, 83, 84.
 but not if made under power, 84, 85.
 See *Revocation*.

MARRIED WOMAN,
 will made by, previously to Married Women's Property Act, 1882..
 47—54.
 might bequeath property acquired as executrix, 48, 49.
 might make will with husband's assent, 49.
 husband's assent to will of, how revoked, *ib*.
 will of, disposing of real estate, 50.
 will of, made under express agreement, *ib*.
 power of, to bequeath separate property, 50, 51.
 will of, made under power, 51—53.
 having obtained protection order, or judicial separation, a *feme sole*
 with regard to property, 53.
 will of, domiciled in Spain, valid, 54.
 when husband banished, *ib*.
 wife of a felon, *ib*.
 rights of, since January 1, 1883, as to acquiring and disposing of
 property, 54—58.
 probate of will of, before and since the Married Women's Property
 Act, 1882.. 56, 57.
 will of, dealing only with realty, when entitled to probate, 58, 125,
 126.
 Statute of Mortmain respecting will of, not affected by Married
 Women's Property Act, 58.
 may be executrix as if *feme sole*, 107, 108.
 will of, without executor, how dealt with, 170.
 domiciled in Canada, grant to attorney of infant children of, 206.
 condemned in costs, 534.
 See *Administration*, &c.; *Bond*; *Citation*; *Commorientes*; *Costs*;
Dissolution; *Executor*; *Grants*; *Guardian*; *Husband*; *Judicial*
Separation; *Limited Grants*; *Probate*; *Protection Order*; *Widow*;
Will.

MARRIED WOMEN'S PROPERTY ACT, 1882.. 47, 48, 54, 55, 58,
 107, 108, 201, 260, 356, 371, 534, 663—672. See *Statutes*.

MATERIALS with which will may be written, 13. See *Will*.

MATRIMONIAL CAUSES ACT (20 & 21 Vict. c. 85), 53, 201, 203.
 See *Statutes*.

MEMORANDUM, referring to alterations in will, 167. See *Alteration*
in Will.

MINOR,

- grant of administration to, 200.
- distinction between, and infant, 243, 244.
- testamentary guardian of, 245.
- administration to relatives of, 246.
- wife a minor, 246, 247.
- grants of administration to guardians of, 247.

See *Administration, &c.*; *Affidavit*; *Citation*; *Costs*; *Execution*; *Executor*; *Infant*; *Limited Grants*; *Probate*; *Probate in Common Form*; *Will*.

MISDESCRIPTION in codicil of prior will, 128, 134. See *Codicil*.

MISTAKE, INADVERTENCE, OR FRAUD, words introduced into will by, 20, 21. See *Will*.

MONOMANIA, definition of, 28.

MORTGAGEE OF CREDITOR, grants to, 223. See *Administration*; *Creditor*; *Grants*.

MOTIONS AND OTHER APPLICATIONS, 338—349.

- rules as to, 338—341.
- restriction on rules *nisi* and orders to show cause, 339.
- where notice of, to be given, *ib.*
- when grounds of to be stated, *ib.*
- length of, *ib.*
- may be dismissed or adjourned where necessary notice not given, 340.
- adjournment of, *ib.*
- service of notice of motion, *ib.*
- date of order on, when drawn up, *ib.*
- what orders on, need not be drawn up, 340, 341.
- when heard during sittings, 341.
- long vacation, *ib.*
- probate of will in district registry after grant on motion, *ib.*
- list of matters properly brought before Court by motion and not by summons, 341, 343.
- pro forma* motions, and motions made under exceptional circumstances, 343.
- striking out defence, 343.
- for grants on presumption of death, 343—349.

See *Administration, &c.*; *Administrator pendente lite*; *Affidavit*; *Appeal*; *Attachment*; *Case on Motion*; *Citations*; *Costs*; *Counsel*; *Creditor*; *Discovery and Inspection*; *Enforcing Orders*; *Evidence*; *Executor*; *Grants*; *Guardian*; *Husband*; *Incorporated Papers*; *Infant*; *Interrogatories*; *Interveners*; *Limited Grants*; *Lost Wills*; *Married Woman*; *Minor, &c.*; *New Trial*; *Obliteration in Will*; *Pleading*; *Probate, &c.*; *Revival*; *Revocation*; *Seaman*; *Soldier*; *Summonses and Motions*; *Time*; *Trial*; *Widow*; *Will*.

NATURALIZATION ACT, 1870..22, 107. See *Statutes*.

NAVY AND MARINES WILLS ACT, 1865..79. See *Statutes*.

NEPHEW, grant to, 211. See *Administration*; *Grants*.

NEW TRIAL,

on rule for, change of venue to assizes refused, 445.

Court to which motion for, to be made, 450.

motions for, *ib.*

new rule as to, 451.

same judge not to sit on, *ib.*

mode of application for, *ib.*

time for service of notice of motion for, *ib.*

ground for granting, 452.

may be ordered on any one question, *ib.*

but not on wrong ruling as to sufficiency of stamp, *ib.*

refused, though plaintiff convicted of perjury, *ib.*

jurisdiction of House of Lords as to, 453.

See *Appeal*; *Assizes*, &c.; *Costs*; *County Court*; *Trial*.

NEXT OF KIN,

when to be cited, 124.

grant to nominee of, 212.

condemned in costs, 536.

See *Administration*, &c.; *Administrator*; *Affidavit*; *Citations*;
Costs; *Distribution*; *Grants*; *Half-blood*; *New Trial*.

NOMINEES,

grants to, of corporation, 172, 173.

of next of kin, 212.

of creditor, 223.

of Duchy of Lancaster, 241.

of guardians of poor, 256.

See *Administration*, &c.

NON-CONTENTIOUS BUSINESS. See *Practice*.

NOTICE,

of writ of summons to defendant, a foreigner, out of jurisdiction, 389.

to cross-examine witnesses only in probate action, 404, 515, 516.

of trial, 443, 444.

of motion for new trial, 451.

of taxation, 519.

cases on, 541, 542.

See *Affidavit*; *Appeal*; *Costs*; *Documents*; *Enforcing Orders*;
Evidence; *Motions*, &c.; *New Trial*; *Pleading*; *Queen's Proctor*;
Time; *Trial*; *Writ of Summons*.

OATHS,

commissioners to administer, 8, 330.

of executors, 266, 268, 269, 285, 326.

of administrators, 288, 290, 293, 298, 301, 304.

various draft oaths, 305—308.

See *Administration*, &c.; *Administrator*; *Commissioners*, &c.;
Executor; *Probate*; *Probate in Common Form*.

OBLITERATION IN WILL,

when operating a revocation, 95, 96.

when to be valid or have any effect, 157, 158.

probate rule as to, 158.

affidavit as to, when required, *ib.*

words inserted in different ink or handwriting do not alone constitute,
159.

OBLITERATION IN WILL—*continued*.

line drawn through with pencil is not an, 165.

of name after execution, 166, 167.

by pasting piece of paper over legacy, how dealt with by Court, 167.

by striking out name, probate in *fac simile*, 168.

how dealt with, on application for probate in common form, 279, 280.

See *Erasures*; *Probate*; *Probate in Common Form*; *Revocation*; *Will*.

OFFENSIVE AND LIBELLOUS PASSAGES in will omitted from probate, 152, 153. See *Probate*.

OFFICIAL SOLICITOR, appointed guardian *ad litem*, costs of, 538. See *Costs*.

OLD AGE, how far affecting capacity to make will, 33. See *Will*.

OMNIA RITE ESSE ACTA, presumption as to, 76.

"ONE COUNTRY OR ONE PROVINCE ONLY," will disposing of property in, how dealt with, 260, 261. See *Limited Grants*; *Will*.

ORDERS, what not subject to appeal, 479. See *Appeal*; *Enforcing Orders*.

"OTHER EFFECTS," bequest of, held to constitute beneficiary residuary legatee, 177. See *Administration with Will annexed*.

"OTHERWISE DESTROYING," for purpose of revocation, 93—95. See *Revocation*.

OUTLAWS,

not capable of making will during outlawry, 58.

may be appointed executors, 108.

See *Administrator*; *Executor*; *Will*.

PARLIAMENT, ACTS OF. See *Statutes*.

PARTICULARS, 395. See *Pleading*.

PARTIES, to probate actions, 350—373. See *Contentious Business*; *Pleading*.

PARTNERS may be appointed executors, 106, 107. See *Executor*.

PARTY,

opposing will must have some interest, 365, 366.

propounding will must call at least one attesting witness, 477.

See *Will*; *Witness*.

PATERNAL AUNT OF MINOR, grant to, as testamentary guardian under 20 & 21 Vict. c. 77, s. 73..247. See *Administration*.

PAUPER,

dying in union, statute relating to, 222.

suing or defending as, 358—360.

rules as to suits in *forma pauperis*, *ib*.

condemned in costs, 537.

See *Costs*; *Statutes*.

PENALTY ON BOND, 310, 314. See *Administration Bonds*; *Bond*.

PENCIL WRITING,

- traced over in ink, not included in probate, 161.
- alterations in, 165.
- copy of, in *red ink*, when to be filed with will, 279.
- fac simile* copy of will containing, rule as to, 420.
- See *Probate*; *Will*.

PENDENTE LITE. See *Administrator pendente lite*.

PERSONAL ESTATE,

- power of alien to acquire and dispose of, 22, 23.
- mixed wills of personalty and realty, 124.
- proceeds of realty under Settled Estates Act is not, 225.
- See *Administration*, &c.; *Administrator*; *Executor*; *Probate*; *Will*.

PERSONAL REPRESENTATIVE. See *Administrator*; *Executor*.

PERSONS WHO CANNOT READ, wills made by, 25. See *Will*.

PLAINTIFF,

- residuary legatee preferred to defendant, 175.
- definition of, 353.
- See *Administration with Will annexed*; — *pendente lite*; *Contentious Business*; *Pleadings*.

PLEADINGS,

- generally, 393—411.
- delivery of, 393, 396.
- prolix, costs of, 393, 394.
- set-off and counterclaim, 394.
- to state material facts, and not evidence, *ib*.
- forms of, rule as to, *ib*.
- particulars, when to be given, 394, 395.
 - further and better, 395.
 - summons for, how to operate, *ib*.
- printing and writing, *ib*.
- probate rule as to delivery of, 396.
- marking, *ib*.
- facts in, when taken to be admitted, *ib*.
- to raise all grounds of defence or reply, 396, 397.
- departure in, 397.
- denial to be specific, *ib*.
- joinder of issue, *ib*.
- negative pregnant, *ib*.
- effect of documents to be stated, 398.
- malice, knowledge, &c., notice, *ib*.
- presumptions of law, *ib*.
- technical objection not to be raised, *ib*.
- striking out, *ib*.
 - defence in interest suit, 402.
 - where no cause of action disclosed, 406, 407.
- cases on striking out pleadings, 398, 399.
- statement of claim in probate action, rule as to, 399, 400.
 - how far plaintiff may alter or extend, 400.
 - relief to be specifically stated, *ib*.
 - founded on separate facts, *ib*.
 - will of person domiciled abroad, 405.
 - default of plaintiff in delivering, 407.

PLEADINGS—*continued.*

- interest actions, meaning of, 400, 401.
 - of party, cannot be disputed after delivery of statement of claim, 401.
 - probate rules as to, 401, 402.
 - pleading by defendant, in answer to suit for administration by Queen's Proctor, 402.
 - defence, time for delivering, *ib.*
 - improper denial of facts in, costs of, *ib.*
 - set-off and counterclaim, 402, 403.
 - title of, 403.
 - reply to, 403, 405.
 - exclusion of, 403, 404.
 - claim against person not party, 403.
 - appearance by third parties, *ib.*
 - notice may be given with, if intention to cross-examine only, 404.
 - probate rule as to, *ib.*
 - pleas in abatement, *ib.*
 - in default of delivering defence, action may proceed, 407.
 - reply, time for delivering, 404.
 - pleading after leave to, *ib.*
 - subsequent to, *ib.*
 - to counterclaim, 405.
 - joinder of issue, *ib.*
 - new assignment, *ib.*
 - plea, that testator did not intend document to operate as will, *ib.*
 - will of later date to be set out in defence, *ib.*
 - no plea but revocation to earlier will, *ib.*
 - where bad for vagueness, *ib.*
 - of want of knowledge and approval, 406.
 - pleading irrelevant matters, *ib.*
 - plea of undue influence and fraud, *ib.*
 - proceedings in lieu of demurrer, *ib.*
 - points of law may be raised by pleading instead of demurrer, *ib.*
 - dismissal of action, *ib.*
 - inherent jurisdiction to restrain frivolous and vexatious proceedings, 407.
 - close of, in default, 407, 408.
 - amendment of, 408.
 - when without leave, *ib.*
 - when Court may allow or disallow, 408, 409.
 - pleading to amended pleading, *ib.*
 - time for amendment, 409.
 - amendments, when to be printed, *ib.*
 - date of, to be marked, *ib.*
 - delivery of, to opposite party, *ib.*
 - clerical mistakes and omissions, 410.
 - general power of Court to amend, *ib.*
 - costs of amendment, *ib.*
 - cases on amendment of pleadings, 410, 411.
 - copies of, for judge at trial, 447.
 - specimens of, (*App.*), 776—780.
 - forms of, under Judicature Acts (*App. C. D.*), 792, 794.
- See *Abatement*; *Affidavit*; *Appeal*; *Assizes*; *Caveats*; *Citations*; *Contentious Business*; *Costs*; *County Court*; *Demurrer*; *Divisional Court*; *Discovery and Inspection*; *Forms*; *Fraud*; *Interrogatories*; *Intervener*; *Motions, &c.*; *Scripts, &c.*; *Summonses, &c.*; *Time*; *Trial*; *Undue Influence*; *Writ of Summons*.

POOR, GUARDIANS OF, grant to, 222. See *Administration, &c.; Creditor.*

POWER OF ATTORNEY. See *Executor.*

PRACTICAL DIRECTIONS,

- for obtaining probate in common form, 269—287.
 - limited grants, 287, 288.
 - administration with will annexed, 289—295.
 - simple administration, 295—305.
 - administration, oaths, 305—309.
 - bonds, 309—320.
 - payments without grants, 320—322.
 - alteration and revocation of grants, 323, 324.
 - resealing Irish and Scotch grants in England, 325, 326.
 - English grant in Scotland, 326—329.
 - increase of duty, 330.
 - summonses, 336—380.
 - motions, 341.
 - caveats, 376, 377.
 - citations, 418.

PRACTICE,

(1.) IN CONTENTIOUS BUSINESS.

See *Abatement of Action; Action; Administrator Pendente Lite; Affidavit; Appeal; Assizes, &c.; Caveats; Citations; Compromise; Contentious Business; Costs; Counsel; County Court; Demurrer; Documents; Enforcing Orders; Evidence; Executor; Guardian; Incapacity; Interrogatories; Intervener; Judge; Lost Wills; Motions and other Applications; New Trial; Pauper; Pleadings; Probate Action; Probate Division; Rules and Orders; Scripts, &c.; Service, &c.; Solicitors; Summonses and Motions; Trial; Will; Witness; Writ of Summons.*

(2.) NON-CONTENTIOUS OR COMMON FORM BUSINESS.

See *Administration, &c.; Administrator, &c.; Advertisement; Affidavit; Alteration, &c. of Grants; Appeal; Attorney; Bastard; Bond; Caveats; Citations; Commorientes; Costs; Creditor; Distribution; Executor; Forms; Grants, &c.; Guardian; Half-Blood; Incorporated Papers; Infants; Irish and Scotch, &c.; Limited Grants; Lost Wills; Lunacy; Married Woman; Minors; Mistake, &c.; Motions, &c.; Obliteration in Will; Primogeniture; Probate; Probate in Common Form; Queen's Proctor; Rules; Seaman; Soldier; Summonses and Motions; Trustees; Widow; Will.*

PRÆCIPE, for writ of execution, 491, 492. See *Enforcing Orders.*

PRESIDENT OF PROBATE DIVISION. See *Judge.*

PRESUMPTION,

- omnia ritè esse acta*, 76.
- as to knowledge and approval of contents of will by testator, 18—21.
- of intention to revoke will, 83.

See *Alteration, &c.; Execution; Revocation; Testator; Will.*

PRESUMPTION OF DEATH, 343—349.

- practice of Probate Division in cases of, 343.
- notice in such cases to be given to insurance office, 344.
- death of person whose estate is in dispute only presumed, *ib.*
- in Chancery Division, 345.

PRESUMPTION OF DEATH—*continued.*

- when person not heard of for seven years, 345, 346.
- where vessel lost at sea, *ib.*
- payment by insurers not alone sufficient for, *ib.*
- of two or more persons perishing by same calamity—*commorientes*—
must be question of evidence in each case, 347.
- examples of, in cases of massacre, railway, shipwreck, &c., 348, 349.
- See *Affidavits*.

PRIMOGENITURE gives no special right to preference in grant of administration, 209. See *Administration*, &c.

PRINCIPAL REGISTRY. See *Rules*, &c.

PRISONERS, how far intestable, 35. See *Will*.

PROBATE,

- generally, 102, 103, 124—155.
- of part of will only granted, 21.
- old form of, no longer necessary, of wills of married women, 57.
- grant of, by Probate Division, 102.
- what it is, 102, 103.
- in common form, 103.
- grant of, in solemn form, *ib.*
- of wills affecting realty and personalty, 124.
- appointment of executor gives right to, 125.
- of will of real estate, when granted, *ib.*
- of married woman's will, 125, 126.
- heirlooms excepted from, *ib.*
- of inoperative codicil, when granted, 126, 127.
- of will appointing guardian only, not necessary, 127.
- of codicil without will, *ib.*
- of codicils tied up with will, *ib.*
- of will and several codicils, 128.
- of codicils not correctly referring to will, *ib.*
- of codicil referring to will not in existence, *ib.*
- of codicil to revoked will, 129.
- of will, and some only of several codicils, 129, 130.
- of codicil not so expressed, 130.
- of codicil, where no attestation clause, *ib.*
- of will proved abroad, *ib.*
- of will contained in several papers, 130—136.
- of testamentary papers described as deeds of gift, 131.
- of will imperfectly copied, *ib.*
- of two wills leaving property in different places, 132.
- of English and foreign wills, 132, 133.
- of inconsistent testamentary papers, 133.
- where erroneous reference by codicil to prior will, 134.
- of two wills of different purport, 134, 135.
- in duplicate, 135.
- of only one of two testamentary papers, 135, 136.
- of more or less than actual testamentary paper, 137.
- of documents incorporated with will, 137, 138.
- probate rules as to, *ib.*
- of documents referred to in duly-executed testamentary instrument, 138.
- cases where documents held to be incorporated with will, 138—142.
- ditto ditto not incorporated, 143—150.
- of less than whole document, 150.
- where clause introduced by fraud, *ib.*
- ditto ditto *per incuriam*, *ib.*

PROBATE—*continued.*

- codicil written on deed by mistake, 150, 151.
- codicil executed at foot of deed not disposing of property after death, 151.
- signature of executor omitted from probate, 151, 152.
- offensive or libellous passages omitted from, *ib.*
- probate of lost wills, 153—156.
- omission or insertion of words in probate by Court, generally, *ib.*
 - not granted on motion except by consent, 153.
 - contents of, how proved, 154, 155.
- of codicil to lost will, 153.
- of lost will, granted after several years, 155.
- in *fac simile*, when granted, 168.
- of copy of pencil writing, rule as to, 420.
- See *Affidavits*; *Alterations, &c.*; *Codicil*; *Costs*; *Documents*; *Domicil*; *Erasures*; *Executor*; *Grants*; *Interlineations*; *Limited Grants*; *Lost Wills*; *Married Woman*; *Motions, &c.*; *Obliterations*; *Probate in Common Form*; *Testamentary Paper*.

PROBATE ACTION OR SUIT,

- what it is, 351—353.
- statement of claim in, 399.
- See *Contentious Business*; *Pleadings*.

PROBATE COURT. See *Probate Division*.

PROBATE DIVISION,

- one of the divisions of High Court, 2.
- who may be president of, 3, 7.
- business assigned to, 3, 4.
- irrelevant matters not to be assigned to, 7.
- president of, powers of, as to common form business, 8, 373.
- concurrent jurisdiction of, with other divisions of High Court, *ib.*
- under Judicature Acts, is a Court of Construction, 52.
- power to order trial at assizes, 446, 447.
- proper place for trial of probate action, 445, 446.
- powers of, as to commissions, &c., 462—465.
- See *Appeal*; *Assizes, Trial at*; *Contentious Business*; *Enforcing Orders*; *Evidence*; *Non-contentious Business*; *Trial*.

PROBATE IN COMMON FORM,

- how to be obtained, and when, 265.
- to whom granted, 265, 266.
- where to be applied for, 266.
- what it is, *ib.*
- oath of executor required, *ib.*
- affidavit for Inland Revenue, *ib.*
- time of issuing grant of, 267.
- delay in applying for grant of, *ib.*
- evidence required before granting, *ib.*
- practice as to, respecting wills dated before 1st January, 1838..267, 268.
- oath, and rules as to, 268.
- forms of affidavits, *ib.*
- marking will and codicils annexed to oath, *ib.*
- proof of identity of executor, when necessary, 268, 269.
- practical suggestions to solicitors applying for grants of, 269—272.
- engrossment of will, 269.
- fees payable for, on estates not exceeding 300*l.*..271.
- increase of grant above 300*l.*, *ad valorem* duty to be paid, 272.

PROBATE IN COMMON FORM—*continued.*

- stamps used, adhesive and impressed, 272.
- cheques taken in payment of, *ib.*
- practical illustration of grant of, 273—276.
- registration and record of will, 277.
- of duplicate will, *ib.*
- incorporated documents, how dealt with, 277, 278.
- sealing wax or other marks on will to be accounted for, 278.
- interlineations, alterations, erasures, and obliterations, how dealt with, 278—280.
- rule as to grant of, where testator blind or illiterate, 280.
- where attestation clause imperfect, 280, 281.
- subscribing witnesses dead, 280.
- execution of will doubtful, 281.
- affidavits not to be registered, *ib.*
- alterations to be attested, *ib.*
- of will insufficiently dated, 281, 282.
- lost wills, 282, 283.
- advertising for, *ib.*
- of draft of will, *ib.*
- double probate, how executor may be sworn, 283.
- duty, how paid on, 284.
- amount of estate in, *ib.*
- form of oath by executor in, &c., &c., 284—287.
- limited grants of, 287.
- practice as to, *ib.*
- See *Advertisement*; *Affidavit*; *Alteration*, &c.; *Bastard*; *Citation*; *Codicil*; *Confirmation*, &c.; *Costs*; *Erasures*; *Executor*; *Fac simile*; *Incorporated Papers*; *Interlineations*; *Irish and Scotch*, &c.; *Lost Wills*; *Motions*, &c.; *Obliteration*, &c.; *Probate*; *Rules*, &c.; *Trustees*; *Will*.

PROBATE RULES, as to setting down cause for trial to be read with Ord. XXXVI. rr. 11, 12, 14, 30..447. See *Rules*.

PROCEEDINGS AT TRIAL, 448. See *Trial*.

PROCEEDS OF REALTY under Settled Estates Act, not personalty, 225. See *Administration*.

PROTECTION ORDER,

- woman who has obtained, is, during continuance thereof, a *feme sole* with regard to her property, 53.
- and may act as administratrix, 201.

PURSER, in man of war, included in words "mariner or seaman," 80.

QUASI INTESTATUS, when a person dies, 103.

QUEEN. See *King or Queen*.

QUEEN'S PROCTOR,

- notice of application to, by creditor for grant of administration, 224.
- See *Solicitor to the Treasury*.

QUESTIONS OF FACT in Court of Appeal, 482. See *Appeal*.

REAL ESTATE,

wills affecting, 124, 125.

citation of persons interested in, 124, 125, 367, 368, 417.

receiver of, 433, 436, 438.

power of alien to acquire and dispose of, 22—24.

See *Administrator pendente lite*; *Affidavit*; *Probate*; *Will*.

REALTY, proceeds of, under Settled Estates Act, not personalty, 225.

See *Administration*, &c.

RECEIVER, 433, 436, 438. See *Administrator pendente lite*.

REGISTRAR cannot direct issues to be tried at assizes, 444, 445. See *Assizes*.

REGISTRARS,

order for alteration or revocation of grant by, 323.

summonses before, 335.

appeal from, to judge, *ib*.

See *Alteration*, &c. of *Grants*; *Summonses*, &c.

REGISTRATION AND RECORD OF WILL, 277. See *Probate in Common Form*.

RENEWAL of writ of summons, 387. See *Writ of Summons*.

RENUNCIATION BY EXECUTOR, 121—123, 235, 236, 289, 290. See *Executor*.

REPLY, 403—406. See *Pleading*.

REPRESENTATION to estates of deceased person, what grants made by Probate Division, 102—105. See *Administration*, &c.; *Limited Grants*; *Probate*; *Probate in Common Form*.

RESIDUARY LEGATEE,

rights of, to a grant, 170, 171, 175.

words constituting a, 176, 177.

See *Administration ad colligendum bona*, &c.; — *with Will annexed*; *Administrator*; *Costs*; *Executor*; *Limited Grant*; *Probate*.

REVIEW OF TAXATION OF COSTS, 529, 530. See *Costs*.

REVIVAL OF WILL OR CODICIL,

how effected, 99.

when not possible, *ib*.

intention to revive must be shown on face of document, 100, 101.

revival cannot be effected by tying will and codicil together, or by implication, *ib*.

See *Codicil*; *Will*.

REVOCATION OF WILL, 83—99.

by marriage, 83, 84.

but not when will made under power, 84, 85.

by another will or codicil, 83, 85—91.

not necessarily by words "last will," 87, 88.

not effected by later will without evidence of intention to revoke, 88, 89.

by express words, 89.

by another will inconsistent with the former, 90.

by later will not forthcoming, *ib*.

REVOCATION OF WILL—*continued.*

"or by some writing,"

meaning of words, 91, 92.

by tearing, burning, or otherwise destroying, 91—95.

by tearing, &c., must be done *animo revocandi*, 92.

by destroying, not effective, without intention, 93.

by cutting off signature, *ib.*

by scratching out signatures, 94.

by cutting out clause appointing executors, *ib.*

when effected by destruction by third person, 94, 95.

when effected by obliterations, alterations, or interlineations, *animo revocandi*, 95, 96.

dependent relative revocation, doctrine of, 96, 97.

codicil not revoked by, 98.

presumption as to revocation, when will lost, 98, 99.

See *Codicil*; *Testator*; *Will*.

RIGHT TO BEGIN, 457. See *Trial*.

RULES AND ORDERS in contentious business, (*App.*) 723—743.

RULES FOR THE DISTRICT REGISTRIES in non-contentious business, (*App.*) 707—722. See *Administration*, &c.; *Affidavit*; *Appeal*; *Blind Persons*; *Bond*.

RULES FOR THE PRINCIPAL REGISTRY in non-contentious business, (*App.*) 676—692. See *Administration*, &c.; *Affidavit*; *Appeal*; *Blind Persons*; *Bond*.

SANITY,

presumption of, 26.

evidence for or against, *ib.*

See *Insanity*; *Lunacy*; *Will*.

SAVE AND EXCEPT. See *Administration Save and Except*.

SCANDALOUS MATTER in affidavit, 473. See *Affidavit*.

SCOTCH AND IRISH GRANTS,

seal of the Court to, 197.

practice as to re-sealing English grants of probate and administration in Scotland and Ireland, 325—329.

SCOTLAND,

finding of Commissary as to Scotch domicil conclusive, 197.

affidavits, how sworn in, 472.

re-sealing English grants in, practice as to, 326.

See *Administration Bond*; *Affidavit*; *Domicil*; *Confirmation in Scotland*; *Irish and Scotch*, &c.; *Statutes*.

SCRIPTS, AFFIDAVIT OF,

rules as to, 419.

what are scripts, 420.

pencil writing on will, rule as to, *ib.*

production of, in possession of solicitor, 431.

See *Affidavit*.

SEALING-WAX, or other marks on will, 278. See *Probate in Common Form*.

SEAMAN,

- will of,
 - statutory restrictions on, when made as security for debt, 45, 46.
 - provisions of Navy and Marines Act as to, 79.
- being at sea, excepted from operation of Wills Act, 59, 61, 79—81.
- includes all members of profession, even though minors, 79, 80.
- "being at sea," what is, 81.
- dying while temporarily on shore, *ib.*
- intestate bastard, administration of effects of, 214.
- payments to representatives of deceased without probate or administration, 320.
- See *Minor* ; *Purser* ; *Statutes*.

SECRETARY OF LEGATION, affidavit of, as to foreign law, 478.
See *Evidence*.

SECURITY,

- bankrupt executor compelled to give, 108.
- to be given by administrator *pendente lite*, 433.
- for costs, 549.
- See *Administration Pendente Lite* ; *Appeal* ; *Costs* ; *Executors*.

SEQUESTRATION, writ of, 494, 551. See *Costs* ; *Enforcing Orders*.

SERVICE,

- of orders, notices, &c., general rules as to, 510, 511.
- affidavit of, 417.
- of citations, 416—418.
- of notice of motion generally, 340.
- for new trial, 451.
- for attachment, 495.
- of writ of summons, 385, 387.
- of subpoena, 470.
- See *Affidavits* ; *Citations* ; *Enforcing Orders* ; *Evidence* ; *Motions*, &c. ; *New Trial* ; *Time* ; *Writ of Summons*.

SET-OFF AND COUNTERCLAIM, 403—405. See *Pleading*.

SEVERAL PAPERS, will contained in, 130—136. See *Will*.

SHERIFF, notice to, to return writ, 340.

SIGNATURE OF TESTATOR, 59—67, 71, 72—75. See *Attestation* ; *Attestation Clause* ; *Testator* ; *Will*.

SIMPLE ADMINISTRATION. See *Administration, Simple*.

SISTER of testator preferred to widow, 173. See *Administration with Will annexed*.

SOLDIER,

- will of, whilst on actual military service excepted from operation of Wills Act, 59, 61, 79—82.
- who are included in the word "soldier," 79, 80.
- when on "actual military service," 80, 81.
- alterations in will of, 82.
- payments to representatives of deceased, without probate or administration, 320, 321.
- See *Execution of Will*.

SOLE LEGATEE, grant to, —next of kin ordered to be cited, 174. See *Administration with Will annexed*.

SOLEMN FORM, probate in, what is, 103. See *Probate*.

SOLICITOR,

agreement by, to accept service of writ of summons, 387.
not entering appearance liable to attachment, 391.
lien of, for costs, 549.

See *Administration, &c.; Attachment; Compromise; Costs; Documents; Letters; Probate in Common Form; Writ of Summons*.

SOLICITORS,

to be known only as, of Supreme Court, 8.
attachment of, 425.
inspection of documents in hands of, 427.
letters to, 428.
disobedience by, to *subpoena* to bring in script, 431.
refusing information as to wills, 432.
when personally liable to pay costs, 516.
lien of, for costs, 549.
bill of, when not liable to taxation, *ib*.

See *Costs; Letters; Practical Directions; Probate in Common Form*.

SOLICITOR TO THE TREASURY (OR QUEEN'S PROCTOR),

grant *ad colligendum bona* to, 263.
costs of, 540.

notice to, by creditor, of application for administration, 224.

39 & 40 Vict. c. 18 (Treasury Solicitor Act, 1876), 213, 214.

See *Administration, &c.; Bastard; Costs; Grants; Queen's Proctor*.

SPECIAL ALLOWANCES on taxation of costs, 520—533. See *Costs*.

SPECIAL CASE, 439—441. See *Trial*.

SPECIAL CIRCUMSTANCES, grants under, under 20 & 21 Vict. c. 77, s. 73..178—181, 226—230, 241, 247, 253, 255, 256. See *Administration, &c.; Administrator; Executor; Grants*.

SPECIAL JURY, 442. See *Trial*.

STAMPS,

used in grants of probate, 272.

cheques taken in payment for, *ib*.

See *Affidavits; Probate in Common Form*.

STATEMENT OF CLAIM, 399—402, 407. See *Pleading*.

STATEMENT OF DEFENCE, 402—407. See *Pleading*.

STATUTES IN EXTENSO IN APPENDIX,

Wills Act (1 Vict. c. 26)....553—562.

Locke King's Act (15 Vict. c. 24)....562—564.

Court of Probate Act (20 & 21 Vict. c. 77)....564—601.

Court of Probate Act (21 & 22 Vict. c. 95)....602—610.

Confirmation, Scotland, 1858 (21 & 22 Vict. c. 56)....610—617.

Act to amend above (22 Vict. c. 30)....618.

Wills of Personal Estate, 1861 (24 & 25 Vict. c. 114)....618, 619.

Wills and Domicil of British Subjects dying Abroad, and of Foreigners dying within Her Majesty's Dominions, 1861 (24 & 25 Vict. c. 121)....619—621.

STATUTES *IN EXTENSO* IN APPENDIX—*continued*.

- Legal Condition of Aliens and British Subjects, 1870 (33 Vict. c. 14)
 621—630.
 Widows and Children of Intestates, where Personal Estate of small
 value, 1873 (36 & 37 Vict. c. 52).... 630, 631.
 Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59).... 632—641.
 Confirmation and Probate, Scotland, 1876 (39 & 40 Vict. c. 70)....
 642—644.
 Customs and Inland Revenue Act, 1881 (44 Vict. c. 12).... 645—662.
 Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)....
 663—672.
 Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29).... 672, 673.
 Colonial Probates Act, 1892 (55 Vict.).... 673, 675.

STATUTES REFERRED TO IN TEXT,

- 13 Edw. I., c. 19 (Stat. of Westminster II.).... 104.
 31 Edw. III., st. 1, c. 11.... *ib*.
 16 Rich. II. 24.
 21 Hen. VIII., c. 5. 104, 120, 169, 170, 206, 243.
 32 & 34 Hen. VIII. 10.
 34 & 35 Hen. VIII., c. 5, s. 14. 47.
 38 Hen. VIII., c. 5. 202.
 12 Ch. II., c. 24, s. 8. 127, 244.
 29 Ch. II., c. 3 (Stat. of Frauds),
 s. 23. 79, 80.
 s. 25. 202.
 9 & 10 Will. III., c. 41, s. 6. 45.
 38 Geo. III., c. 87,
 s. 1. 181, 241, 248, 250, 251.
 s. 6. 107, 243.
 39 & 40 Geo. III., c. 88. 24.
 43 Geo. III., c. 108. 58.
 53 Geo. III., c. 127. 121.
 55 Geo. III., c. 60, s. 4. 45.
 1 Will. IV., c. 20 (Seamen) 45, 214.
 1 Vict. c. 26 (Wills Act),
 s. 3. 10.
 s. 7. 24.
 s. 8. 47, 193.
 s. 9. 21, 59, 63, 65—79.
 s. 10. 60, 193.
 s. 11. 61, 79, 81.
 s. 18. 83, 84, 85, 192.
 s. 19. 83.
 s. 20. 83, 85, 95.
 s. 21. 95—99, 157.
 s. 22. 99—101.
 s. 24. 47, 48.
 12 & 13 Vict. c. 103, s. 16 (pauper dying in union).... 222.
 13 & 14 Vict. c. 35. 441.
 15 Vict. c. 24 (Locke King's Act), s. 1. 60, 63.
 18 & 19 Vict. c. 42. 476.
 20 & 21 Vict. c. 77 (Court of Probate Act, 1857).... *passim*.
 20 & 21 Vict. c. 79 (Ireland),
 s. 94, *in notis*. 194.
 s. 95. 198.
 20 & 21 Vict. c. 85 (Matrimonial Causes Act, 1857), s. 21. 53, 201,
 203.
 21 & 22 Vict. c. 56 (Scotland), ss. 9, 12, 14, *in notis*. 194—198.

STATUTES REFERRED TO IN TEXT—*continued*.

- 21 & 22 Vict. c. 95 (Court of Probate Act, 1858),
 s. 10....485.
 ss. 11, 12....488.
 s. 18....241, 249, 251.
 ss. 21, 22....433.
 s. 23....429.
- 23 Vict. c. 15 (Scotland), s. 10, *in notis*....197.
- 23 & 24 Vict. c. 80 (Scotland)....*ib*.
- 24 & 25 Vict. c. 114, ss. 1, 2....190—193.
- 24 & 25 Vict. c. 121 (foreigner dying in England), s. 4....217.
- 28 & 29 Vict. c. 72 (Navy and Marines, Wills Act, 1865), s. 4....
 79.
- Debtors Act, 1869, s. 5....491.
- 33 & 34 Vict. c. 14 (Naturalization Act, 1870)....22, 107.
- 33 & 34 Vict. c. 23....54, 58, 215.
- Judicature Act, 1873,
 s. 3....1.
 ss. 4, 5, 11, 16, 23, 31....2.
 s. 31, sub-s. 5, ss. 32, 33, 34....3.
 ss. 39, 42, 44....4.
 s. 77....5.
 s. 24, sub-s. 6, 7, s. 82....8.
 s. 25, sub-s. 8....438.
 ss. 49, 50....479.
 s. 100....381.
- Judicature Act, 1875,
 s. 11, sub-s. 3....7, 353.
 s. 18....7, 332.
- Appellate Jurisdiction Act, 1876, ss. 3, 4, 11....484.
- 39 & 40 Vict. c. 18 (Treasury Solicitor Act, 1876),
 ss. 1, 2....213.
 ss. 4, 5, 6, 9....214.
- Married Women's Property Act, 1882....47, 48.
 s. 1, sub-s. 1, ss. 2, 4, 5, 23....55.
 s. 1, sub-s. 2....107.
 s. 24....*ib*.
 s. 18....108.
- Bankruptcy Act, 1883....204.
- Intestates' Estates Act, 1884,
 ss. 2, 3....215, 216.
 ss. 4, 5, 6, 7, 8, 9....216.
- Guardianship of Infants Act, 1886, ss. 1, 2....245, 246.
- Intestates' Estates, Act, 1890,
 ss. 1, 2....232.
 ss. 3, 4, 5, 6, 7, 8....233.
- Judicature Act, 1890,
 s. 2....7, 454.
 ss. 1, 2, 3....450, 451.

STRANGER IN BLOOD, elected by children as testamentary guardian,
 grant to, 174. See *Administration with Will annexed*.

STRIKING OUT PLEADINGS, 406. See *Pleadings*.

SUBPŒNÂ, to bring will into registry, attachment for not obeying, 496.
 See *Attachment*; *Enforcing Orders*; *Evidence*; *Witness*.

SUBPENÂ AD TESTIFICANDUM OR *DUCES TECUM*, 468. See *Witness*.

SUBSTITUTED EXECUTOR, how appointed, 116. See *Executor*.

SUBSTITUTION, of sureties to administration bond, 318. See *Administration Bond*; *Bond*.

SUIT. See *Action*.

SUMMONSES AND MOTIONS,

rules as to, 332—341.

non-contentious business not affected by Judicature Acts, 332.

jurisdiction of registrars, with certain exceptions, same as that of judge at Chambers, 334.

matters coming before registrars on, 335.

appeal from registrar to judge, *ib.*

time for, in Probate Division, *ib.*

appeals from Chambers to Court of Appeal, 335, 336.

matters formerly brought by act on petition now brought by summons, 336.

matter proper for summons, not to be brought on motion, *ib.*

when heard, *ib.*

See *Motions and other Applications*.

SUPPLEMENTAL OR CESSATE ADMINISTRATION. See *Administration*, *Supplemental*, &c.

SURETIES,

execution of administration bond by, 310.

justification by, 313, 314.

substitution of, 318.

See *Administration Bonds*; *Administrator pendente lite*; *Bond*.

SYNDICS, grant of administration to, with will annexed, 106. See *Administration with Will annexed*.

TABLES OF COSTS, 829—837. See *Costs*.

TAXATION OF COSTS, 518—534, 549, 550. See *Costs*.

TEARING WILL for purpose of revocation, 92. See *Revocation*.

TESTAMENTARY CAPACITY. See *Affidavit*; *Blind*; *Deaf and Dumb*; *Drunkenness*; *Execution*; *Felon*; *Idiot*; *Illiterate*; *Insanity*; *King or Queen*; *Lunatic*; *Outlaws*; *Sanity*; *Will*.

TESTAMENTARY GUARDIAN. See *Guardian*.

TESTAMENTARY PAPER,

form of wording of, not material, in order to operate as a will, 12.

documents treated as, 14, 15.

witness attesting must be aware that document is a, 73.

See *Codicil*; *Deed*; *Will*.

TESTATOR,

knowledge and approval of contents of his will, 18.

presumption as to, 18, 19.

knowledge of contents of, by third person, 19.

TESTATOR—*continued.*

- will prepared in accordance with instructions, not read over, 19, 20.
- words introduced into will without knowledge and approval of, 20, 21.
- signature of, at foot or end of will, 59.
 - at, or after, or following, or under, or beside, or opposite to, 60.
 - by mark, 61.
 - and witnesses, on separate papers, 62.
 - by some other person for testator, 62, 63.
- position of testator's signature, 63, 64.
- cases where testator's signature considered sufficient as to position, 66.
 - ditto ditto insufficient, 66, 67.
- must sign before witnesses, *ib.*
- acknowledgment of signature by, what amounts to, 71—76.
- mutual presence of, and witnesses, 76.
- declarations of, admissible to show intention, 89.
 - as to contents of will, 154.
- erroneous impression on mind of, as to revocation, 97.
- domicil of, how affecting grants of probate and administration, 183—198.
- See *Attestation*; *Attestation Clause*; *Codicil*; *Execution*; *Will*; *Witness*.

THE SOVEREIGN. See *King or Queen*.

TIME,

- for issuing grant of probate in common form, 267.
- for issuing letters of administration, 296.
- for appeal, 480.
- meaning of "month," 502.
- expiring on Sunday or close day, 503.
- for giving security for costs, *ib.*
- power of Court to enlarge or abridge, *ib.*
- of day for service, 504.
- table of times limited by the Rules and Orders of the Supreme Court, 1883..504—506.
- See *Administration, &c.*; *Appeal*; *Probate in Common Form*.

TREASURY SOLICITOR ACT, 1876..213, 214. See *Solicitor to the Treasury*; *Statutes*.

TRIAL, 439—459.

- special case by consent, 439.
 - by order before, *ib.*
 - to be printed, 440.
 - when leave required to set down for argument, *ib.*
 - form of entry for argument, *ib.*
 - agreement by parties to, as to payment of money and costs, *ib.*
 - application of Order XXXVI. to, 441.
 - under Sir G. Turner's Act, *ib.*
- without a jury, discretion of judge of Probate Division as to, *ib.*
 - except where heir-at-law is party, and insists upon having a jury, *ib.*
- Court of Appeal will not interfere with discretion of judge as to mode of, *ib.*
- of case twice by jury—order for trial without jury upheld by Court of Appeal, 442.

TRIAL—*continued.*

- by special jury at desire of plaintiff, 442.
of defendant, *ib.*
by order of judge, *ib.*
certificate for, *ib.*
- before single judge, *ib.*
- notice of, by plaintiff, 443.
by defendant, *ib.*
ten days' notice of trial, *ib.*
- entry of trial, *ib.*
- avoidance of notice of, *ib.*
- notice of, in London or Middlesex, *ib.*
in the country, 443, 444.
countermanding, 444.
- entry for trial, by party served with notice, *ib.*
generally, *ib.*
- trial at assizes, 444, 445.
power of judge to order, 445, 446.
- Probate Division, proper place for, of probate action, 445.
- venue for, to be named in statement of claim, *ib.*
- order to remove new trial to assizes refused, *ib.*
- consent of parties to, not sufficient to send case for trial at assizes, 446.
- trial at assizes allowed, *ib.*
refused, *ib.*
- no power to order trial at assizes, without jury, *ib.*
- copies of pleadings to be delivered for use of judge, 447.
- Probate Rules as to setting down cause for trial, to be read with rr. 11, 12, 14, 30 of Order 36., *ib.*
- proceedings at trial, 448.
- default of appearance by plaintiff or defendant, 448.
- judgment by default, *ib.*
- adjournment of trial, *ib.*
- habeas corpus* to bring up party to attend trial, *ib.*
- with jury, speeches to jury, 448, 449.
- disallowance of vexatious questions in cross-examination, 449.
- judgment and further consideration, *ib.*
- commencement and termination of, *ib.*
- entry of findings of fact on, at assizes, *ib.*
- certificate for entry of judgment, *ib.*
- motion for new trial, 450, 451.
same judge not to sit on, 451.
time for service of notice of, *ib.*
- ground for granting new trial, 452.
- new trial ordered on any one question, *ib.*
but not by reason of wrong ruling as to sufficiency of stamp, *ib.*
refused, though plaintiff convicted of perjury, *ib.*
jurisdiction of House of Lords as to, 453.
- judgment, motion for, *ib.*
where wrong on finding of jury, *ib.*
setting aside, 453, 454.
setting down motion for, where issues have been directed and tried, 454.
setting down motion for, where some issues only have been tried, *ib.*
- motion for, to be set down within one year, *ib.*
- where judgment given, &c., on motion for new trial, &c., 455.
- entry of judgment, *ib.*
- date of judgment pronounced in Court, *ib.*
entry of judgment otherwise, *ib.*

TRIAL—*continued*.

time to be stated in judgment for doing any act ordered to be done, 456.

entry of judgment on production of affidavit or document, *ib.*
on production of order or certificate, *ib.*

judgment by consent, where defendant appears by a solicitor, *ib.*
of defendant in person, 456, 457.

right to begin, 457.

compromise, at, or before trial, made rule of Court, *ib.*

by executors renouncing, refused by Court, *ib.*
at trial, 457, 458.

application to make compromise rule of Court after two years refused, 458.

next of kin bound by decree though not cited, *ib.*

but not where suit has been compromised, *ib.*

judicial observations on compromise, 458, 459.

See *Appeal*; *Assizes*; *Compromise*; *Costs*; *County Court*; *Evidence*; *Lost Wills*; *New Trial*; *Pleading*; *Witness*.

TRUSTEES,

when executors according to the tenor, 111, 112.

grant to, 171.

See *Administration, &c.*; *Administrator*; *Citation*; *Costs*; *Executor*; *Limited Grants*; *Probate*.

UNDUE INFLUENCE,

wills obtained by, 38.

what is, 39—44.

must amount to coercion, 40, 43.

in the case of wills of seamen, 45.

costs of, where improperly alleged, 46.

names of parties charged with, to be given, but not particulars of acts, 395.

must be specially pleaded, 406.

See *Costs*; *Pleading*; *Will*.

UNIVERSAL LEGATEE. See *Administration with Will Annexed*.

VENUE, in probate actions, 445. See *Trial*.

WARNING. See *Caveat*.

WHO MAY MAKE A WILL, 22—58. See *Will*.

WIDOW,

administration with will annexed, granted to, 172, 175.

sister of testator preferred to, 173.

Court not bound to make grant to, 206.

joint grant to, and another, 206, 207.
refused, *ib.*

divorced wife, 207.

widow against whom misconduct charged, 207, 208.

lunatic in asylum abroad, 208.

joint grant to, and guardian of children by former marriage, 246.

WIDOW—*continued*.

when to be cited, 367.

executrix dying without taking probate, *administration pendente lite*, 435.

See *Administration, &c.; Administrator Pendente Lite; Citations; Costs*.

WIDOWER, dying without administering wife's effects, grant to representative of estate of wife, 205. See *Administration, &c.; Administrator; Citation; Costs; Executor; Husband; Married Woman; Probate; Grants*.

WIDOWS AND CHILDREN OF INTESTATES,

where personal estate of small value, 1873..630, 631.

1890..233, 673.

WIFE. See *Administration, &c.; Administrator; Citation; Costs; Executor; Husband; Married Woman; Probate*.

WILL,

nature and form of, 10—17.

what it is, 11.

testamentary form not necessary, 12.

language of, *ib*.

materials with which written, 13.

cannot be irrevocable, *ib*.

when paper not intended as such may operate as a will, *ib*.

deed executed as, 13, 14.

principles deciding what is a, 14, 15.

examples of testamentary papers, 15.

when a document is not entitled to probate, 15, 16.

contingent wills, 16.

conjoint or mutual wills, 17.

knowledge of contents of will by testator, 18.

how presumed, *ib*.

or rebutted, 19.

knowledge of contents by third person, *ib*.

prepared according to instructions, but not read over, 19, 20.

words introduced into, by mistake, &c., 20, 21.

probate of part of only granted, 21.

who may make a, 22—58.

general principles, 22.

aliens, 22—24.

sovereign's power to make, 24.

incapacity to make wills, 24—27.

will made by lunatic during lucid interval, 27.

by persons suffering from partial insanity, such as delusions or *monomania*, 28—32.

by aged persons, drunkards, &c., 33.

persons of doubtful capacity, 33, 34.

will made by prisoner, 35.

obtained by force, *ib*.

made under influence of fear, 35, 36.

obtained by fraud, 36.

by beneficiary, 36, 37.

by importunity, 38.

by undue influence, 38—44.

of seamen, 45, 46.

statutory restrictions on, 45.

of married women, 47—58.

WILL—*continued.*

- how a will may be executed, 59—82.
- before and since passing of Wills Act, 59.
- signature of testator to, 60, 61.
 - by mark, 61.
 - of testator and witnesses on separate papers, 62.
 - for testator, by some other person, 62, 63.
 - position of, 63, 64.
 - when sufficient, 65.
 - or insufficient, 66, 67.
 - of witnesses, 66—71.
 - when sufficient, 68, 69.
 - or insufficient, 70.
 - acknowledgment of, by testator, 71—76.
- presumption of due execution of, 76—78.
- written on several sheets, 78, 79.
- of soldiers and mariners, 79—82.
- how revoked and revived, 83—101.
- revocation of, by marriage, 83—85.
 - by will or codicil, or by burning, tearing, or destroying, 83.
 - by another will or codicil, 85—91.
 - by tearing, burning, or otherwise destroying, 91—95.
- obliterations, interlineations in, 95, 96.
- dependent relative revocation of, 96, 97.
- codicil not revoked by revocation of will, 98.
- presumption as to revocation of lost will, 98, 99.
- revival of, 99.
 - how shown, 100, 101.
- wills affecting real estate, heir and others interested in, to be cited, 124, 125.
- appointment of executor gives right to probate of, 125.
- when will of real estate entitled to probate, *ib.*
- will of married woman dealing with realty only, 125, 126.
- appointing guardian only, 127.
- codicil proved without will, *ib.*
- codicils tied up with will, *ib.*
- codicil referring to will not in existence, 128.
- codicil revoked, 129.
- will proved abroad, 130.
- contained in several papers, 130—136.
- imperfectly copied, 131.
- limited to property in different places, 132.
- English and foreign, *ib.*
- inconsistent wills, 133.
- erroneous reference by codicil to prior will, 134.
- probate in duplicate, 135.
 - granted to one of two testamentary papers, 135, 136.
- incorporation of documents, 137—152.
- invalid, incorporated with valid codicil, 142.
- documents referred to in, when not incorporated with, 143—150.
- offensive or libellous passages in, where omitted from probate, 152.
- lost wills, when probate granted of, 153.
 - practice as to granting probate of, on motion, *ib.*
 - probate of codicil to, *ib.*
 - secondary evidence of contents of, 153, 154.
 - probate of, granted after several years, 155, 156.
 - administration granted until found, 257.

WILL—*continued.*

- interlineations and alterations in, 157—168.
 - rules as to, 158, 159.
- erasures and obliterations in, 158.
 - rules as to, 158, 159.
- words inserted in different ink or different handwriting, 159.
- alterations and erasures, presumption as to, 160.
 - probate of, by consent, *ib.*
- trifling alterations in holograph will, 161.
 - one word substituted for another, *ib.*
- of soldier on military service, alterations in, *ib.*
- pencil writing traced over in ink, *ib.*
- administration with will annexed, 169—182.
 - practice as to, 289—295.
- validity of will by law of deceased's domicil, 183, 184.
- of British subject made out of the United Kingdom, under 24 & 25 Vict. c. 114.. 190.
- of British subject made within United Kingdom under 24 & 25 Vict. c. 114.. *ib.*
- validity of, not affected by change of domicil, 191.
- made before August 6, 1861, not affected by 24 & 25 Vict. c. 114.. *ib.*
 - beneficial effect of above statute, *ib.*
- made in England, testator domiciled abroad, 192.
- in English form, relating to property in England; in French form, relating to property in France, *ib.*
- not revoked by change of domicil, *ib.*
- law of one country only at a time regarded as affecting validity of will, 192, 193.
- of alien whose domicil of origin was English, made abroad, 193.
- of alien domiciled in this country, made according to law of domicil of origin, *ib.*
- by Englishman resident in Scotland, *ib.*
- where will supposed to exist, administration may be granted to next of kin, 212.
- administration granted where will shows signs of insanity, 226.
- disposing of property in one province, or one country only, how dealt with, 260, 261.
- probate of, in common form, practice as to, 265—288.
- probate of, in solemn form, 352.
- who may put executors on proof of, 364.
- party opposing, must have some interest, 365.
- creditor's right to oppose, 366.
- parties to be cited to see proceedings, 367—371.
- caveat for purpose of disputing, 374—380, 414.
- evidence in respect of, 460—478.
- party propounding must call at least one attesting witness, 477.

See *Administration with Will annexed; Advertisement; Affidavit; Aliens; Alterations, &c.; Attestation; Blind Persons; Codicil; Coercion; Contingent Will; Corporation; Costs; Deaf and Dumb; Deed; Documents; Domicil; Drunkenness; Erasures, &c.; Execution, &c.; Fac simile; Felon; Fraud; Husband; Idiot; Importunity; Inconsistent, &c.; Incorporated Papers; Infant; Insanity; Interlineations; King or Queen; Lost Wills; Lunatic; Married Woman; Minor; Mistake, &c.; Obliteration; Old Age; Outlaw; Pencil Writing; Persons who cannot read; Prisoners; Probate; Probate in Common Form; Revival; Revocation; Sanity; Seaman; Soldier; Statutes; Testamentary Paper; Undue Influence.*

WILLS ACT, 10, 21, 24, 47, 60, 61, 63, 65—79, 81, 83—101, 192, 193, 553—562. See *Statutes*.

WILLS OF PERSONAL ESTATES ACT, 1861..618, 619. See *Statutes*.

WITNESS,

- signature of testator in presence of, 59.
 - on separate paper affixed to will, 62.
- position of signatures by, less important than that of testator's signature, 66.
- testator must sign before, 67.
- to will, must be present at same time, 67—70.
- must sign, or make mark, 68—70.
 - with intention of attesting testator's signature, 68, 69.
- must see testator writing something on will, but not necessarily his name, 71.
- ought to be aware that the paper is testamentary, 73.
- mutual presence of, and testator, what amounts to, 75, 76.
- initialing alterations, 165.
- name of attesting witness written on erasure, 167.
- subscribing witnesses, practice when both dead, 280.
 - affidavit by, to show how will was executed, 281, 282.
- attendance of, at any time for examination in Court, 428.
- to be examined *vivâ voce*, 460.
- attesting, not forthcoming, *ib*.
- unable to attend, 461.
- examination of, before judge, or officer, *ib*.
- commission to examine, 462—465.
- refusal of, to attend, 467.
- attendance of, under *subpœna ad testificandum* or *duces tecum*, 468.
- party propounding will must call at least one of the attesting, 477.
 - See *Affidavit*; *Attestation*; *Attestation Clause*; *Costs*; *Evidence*; *Execution*; *Testator*; *Will*.

WOMAN HAVING PROTECTION ORDER, 53, 201. See *Dissolution of Marriage*; *Protection Order*.

WORDS

- introduced by mistake into will, 20, 21.
- written on erasure in will, 159.
 - See *Erasures in Will*; *Testator*; *Will*.

WRIT. See *Attachment*; *Costs*; *Enforcing Orders*.

WRIT OF SUMMONS,

- action commenced by, 381, 382.
- prolix form of, costs of, 382.
- form of, 781.
- for service out of jurisdiction, form of, 782.
- date of, 383.
- indorsement of, *ib*.
- forms of indorsement, 785.
- in probate action must issue out of Central Office, 384.
- rules as to preparation of, *ib*.
- in probate action, affidavit before, 385.
- practical directions as to, *ib*.
- issue of concurrent, within twelve months, *ib*.

WRIT OF SUMMONS—*continued.*

- service of, out of jurisdiction, 385, 386.
 - declaration by solicitor, whether issued with his authority, 386.
 - to be in force for twelve months only, *ib.*
 - renewal of writ, 386, 387.
 - evidence of renewal, 387.
 - lost writ, *ib.*
 - agreement of solicitor to accept service of, *ib.*
 - mode of service of, *ib.*
 - substituted service, *ib.*
 - service of, on husband and wife, *ib.*
 - on infant, 387, 388.
 - on lunatic, 388.
 - on corporations, *ib.*
 - indorsement of date of service, 388, 389.
 - affidavit for substituted service, 389.
 - in probate actions out of jurisdiction, how applied for, *ib.*
 - limit of time for appearance to writ, *ib.*
 - notice in lieu of writ, *ib.*
 - notice of writ to defendant, foreigner out of jurisdiction, *ib.*
 - appearance to, notice of, 390.
 - mode of entering, *ib.*
 - notice of, *ib.*
 - address of defendant for service, *ib.*
 - by defendant in person, 391.
 - memorandum of, must contain *bonâ fide* address, *ib.*
 - by two or more defendants by same solicitor, *ib.*
 - solicitor not entering, liable to attachment, *ib.*
 - time for appearance, *ib.*
 - by intervener, 392.
 - default of, by infant or person of unsound mind, *ib.*
 - guardian to infant declining to enter appearance, *ib.*
 - when party may proceed in default of appearance, *ib.*
- See *Contentious Business ; Costs ; Pleading.*



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